

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)



VOL. 44 NO. 1

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JANUARY-FEBRUARY 1985

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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

TABLE OF CONTENTS

JANUARY-FEBRUARY 1985

	PAGE
LIST OF DECISIONS REPORTED JANUARY-FEBRUARY 1985.....	1
AGRICULTURAL MARKETING AGREEMENT ACT, 1937... ..	11
ANIMAL QUARANTINE AND RELATED LAWS... ..	194
ANIMAL WELFARE ACT	152
EGG RESEARCH AND CONSUMER INFORMATION ACT.	240
FEDERAL MEAT INSPECTION ACT.....	243
HORSE PROTECTION ACT.....	248
PACKERS AND STOCKYARDS ACT	
DISCIPLINARY DECISIONS.....	258
PERISHABLE AGRICULTURAL COMMODITIES ACT	
COURT DECISION.....	304
DISCIPLINARY DECISIONS.....	314
REPARATION DECISIONS.....	364
REPARATION DEFAULT DECISIONS.....	617
PLANT QUARANTINE.....	633
SUBJECT INDEX, JANUARY-FEBRUARY 1985.....	643

NOTE

A list of Decisions Reported and a Subject Index are published in each issue. A List of Decisions Reported and a Subject Index for the calendar year or volume are published in the November-December issue

JANUARY-FEBRUARY 1985

PAGE

AGRICULTURAL MARKETING AGREEMENT ACT, 1937

DEFIANCE MILK PRODUCTS CO., A DIVISION OF DIEHL INC AMA Docket No M33-3. Dismissal.	11
COUNTY LINE CHEESE CO. INC COUNTY LINE CHEESE COMPANY, A DIVISION OF BEATRICE FOODS Co , and MEADOW GOLD DAIRY, DIVISION OF BEATRICE FOODS Co AMA Docket No M49-1 Dismissal.....	63

ANIMAL QUARANTINE AND RELATED LAWS

ANDREWS, PHILIP. AQ Docket No. 97. Decision And Order	213
ASC AIR CARGO SERVICES INC AQ Docket No 22. Consent Decision....	195
A W. CHERRY AND SONS AQ Docket No. 77. Consent Decision	235
BROWN, BOB. AQ Docket No 108 Decision Amended.....	231
BURK, RAY d/b/a BURK LIVESTOCK COMPANY AQ Docket No. 23. Decision And Order	222
BROWN, BOB AQ Docket No. 108. Consent Decision.	207
C.R. SCOTT AND Co. INC. AQ Docket No 48. Consent Decision	204
GILLIAND, PLUMA AQ Docket No. 132. Consent Decision.....	232
HALL, DELL and STEVEN W. ULLOM D.V.M. AQ Docket No 24. Decision As To Dell Hall	197
HORNER, THOMAS W. JR. AQ Docket No. 20 Ruling On Certified Question.....	200
PANTALION, M.L. and JOEY. AQ Docket No. 108 Consent Decision.....	209
PIONEER BEEF COMPANY AQ Docket No 108. Consent Decision.....	210
SANNESS, LLOYD d/b/a PORK CENTRAL FEEDER PIGS and WILLIAM BESSLER. AQ Docket No 122. Consent Decision By Lloyd Sammes....	238
SANNESS, LLOYD d/b/a PORK CENTRAL FEEDER PIGS and WILLIAM BESSLER. AQ Docket No. 122 Consent Decision, William Bessler... .	237
SCOTT, CORDIS O AQ Docket No 61 Consent Decision.. . . .	219
SILVA, ANTONIO, CARLOS and OLINDA d/b/a ROCKY MILL FORM. AQ Docket No 121 Consent Decision As To Carlos Selva	204
SMITH, BOB. AQ Docket No. 85 Consent Decision	194
STACKS, JOHN B. AQ Docket No. 42 Order Dismissing Complaint.....	231
STOKES AND BROGDEN STOCKYARD INC. AQ Docket No. 109 Decision And Order.....	217
STOTLER, PATRICIA LEE, a.k.a PATRICIA PELTIER. AQ Docket No. 120. Order Granting Motion To Dismiss....	219
TERRY'S FORM SERVICE, INC. and TOMMY JOE TOWNSEND. AQ Docket No. 135. Consent Decision	233
THOMAS, WALTER RAY. AQ Docket No. 110. Decision And Order	220
THOMPSON, ALLAN. AQ Docket No. 101. Decision and Order.....	215
VILLARI, SALVATORE and VILLARI TRUCKING COMPANY d/b/a S&J VILLARI LIVESTOCK COMPANY. AQ Docket No. 118. Order Dismissing Complaint.....	195
WHEELER, JEAN AQ Docket No. 28. Decision And Order.....	202
WOOD, WILLIAM "Ed" AQ Docket No 82 Ruling On Certified Question	206

*Reported in this issue.

ANIMAL QUARANTINE AND RELATED LAWS—Cont.	PAGE
WRIGHTS NASSAU COUNTY FARMS INC, W.P. WRIGHT SR, and W.P. WRIGHT JR. AQ Docket No 131 Consent Decision	212
ANIMAL WELFARE ACT	
BEROUSEK, OTAKOR, a/k/a OTTO BROSINI. AWA Docket No. 241. Consent Decision	173
DELTA AIRLINES INC. AWA Docket No 327 Consent Decision	157
GRAY, JUDY, DICK W. PIRKEY and SHARON DOGA. AWA Docket No 227 Consent Decision	171
KIRK, RONALD d/b/a KIRKS KENNEL AWA Docket 312 Consent Decision	155
KNUDSEN, H. HENRY d/b/a KNUDSENS. AWA Docket No. 330 Consent Judgement	170
LEMKE, JOE AWA Docket No 319. Consent Decision	153
MT. WACHUSSETT ANIMAL FOREST CORP, FRANCES APPELEY and LINDA WEINTROUB. AWA Docket No 286. Decision And Order	158
RICHARD, EMAGENE Ms AWA Docket No 315. Consent Decisions.....	154
STUEKERJURGEN, JAMES and JULIA, d/b/a CORNER VIEW KENNELS. AWA Docket No. 265 Decision And Order	187
UNIVERSITY OF CONNECTICUT AWA Docket No. 273 Consent Decision...	152
ZARTMAN, MARLIN A. d/b/a GILBERTSVILLE SALES STABLES AWA Docket No 259 Decision And Order.	174
EGG RESEARCH AND CONSUMER INFORMATION ACT	
L. DOTSIE EGG FARM ERICA Docket No 6 Decision And Order	240
FEDERAL MEAT INSPECTION ACT	
SUMMIT BEEF COMPANY. FMIA Docket No 81 Decision And Order ..	243
WARSAW MEAT COMPANY. FMIA Docket No 82 Stipulation And Consent Decision.. ..	245
HORSE PROTECTION ACT	
PALMER, DIGBY E. HPA Docket No 132. Decision And Order. . . .	248
VOLKHART, TRUMAN. HPA Docket No 169, 172, 176, 177 Consent Decision And Order. . . .	248
PACKERS AND STOCKYARDS ACT	
ALEXANDER, ROYAL J and ALPHA ALEXANDER P&S Docket No 6405 Decision And Order Upon Admission Of Facts By Reason Of Default.....	277
BARKLEY, MAX JR. P&S Docket No. 6402 Consent Decision.....	258
C&H CATTLE COMPANY INC. and CALVIN DENEFIN. P&S Docket No. 6232. Consent Decision	274
ECKERT, LINDSEY E., RONALD T. BOWMAN and GEORGE YOUNG P&S Docket No 6474 Decision With Respect To Lindsey E. Eckert.....	296
FREDRICKTOWN AUCTION Co., INC P&S Docket No. 6414 Decision ...	292
GOTHAM PROVISION Co INC and WARREN B. MOORE P&S Docket No 6439. Consent Decision.....	287

PACKERS AND STOCKYARDS ACT—Cont.	PAGE
GRINSTEAD, JOE P&S Docket No 6466 Consent Decision	282
HEINHOLD HOG MARKET INC, and BENJAMIN J SMITH P&S Docket No 6479 Consent Decision With Respect To Benjamin J Smith.	283
HEINHOLD HOG MARKET INC. and BENJAMIN J SMITH P&S Docket No. 6479 Consent Decision With Respect To Heinhold Hog Market Inc	270
HIGGINS, JIMMY P&S Docket No. 6415 Decision	295
HULINGS, G PALMER, RONNIE C AUSTIN, and GEORGE CLINTON McDONNELL P&S Docket No 5744 Order Denying Late Appeal.	298
HULINGS, PALMER G., RONNIE C AUSTIN, and GEORGE CLINTON McDONNEL P&S Docket No. 5744. Decision And Order	262
KORNBRUST, HAROLD P&S Docket No 6241 Supplemental Order	303
ORANGE MEAT PACKING Co., INC., and G & L. PACKING Co., INC. P&S Docket No. 5717 Consent Decision With Regard To Orange Meat Packing Inc.	290
RAASCH, CORA B. P&S Docket No 6465 Consent Decision	273
RECTOR AUCTION SALE BARN, INC. P&S Docket No 6462 Consent Decision.	280
SOUTHWESTERN SALES Co INC., P&S Docket No. 6176. Consent Decision ..	286
SPENCE, PAUL J P&S Docket No 6456 Consent Decision.. ..	279
STAFFORD, ROBERT E., and CHARLES RAY P&S Docket No 6381. Amend Stay Order	298
STAFFORD, ROBERT E. and CHARLES RAY P&S Docket No 6381 Stay Order.....	298
STANDISH STOCKYARDS INC, NORMAN DALE PECK, and RAYMON BALZER P&S Docket No. 6125. Consent Decision With Respect To Norman Dale Peck	260
WATT, NORMAN. P&S Docket No 6419. Decision	293
WALKER, DANE and JULIA. P&S Docket No. 6212 Supplemental Order .	303
WILSON, GARY. P&S Docket No 6408 Consent Decision	289

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

COURT DECISION:

PUPILLO, SALVATORE, PETITIONER v. UNITED STATES OF AMERICA and UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, and JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES. CVA-84-1666 Appeal From Order Of United States.....	304
---	-----

DISCIPLINARY DECISIONS:

ASSOCIATED FOOD SERVICES INC, d/b/a ASSOCIATED/ROMNEY FOOD SERVICES PACA Docket No. 2-6605 Decision And Order	357
CUSUMANO BROS & Co INC PACA Docket No 2-6640. Decision And Order.....	331
D.S. RUSSELL AND SONS INC. PACA Docket No. 2-6644 Decision And Order.....	354
FARM MARKET SERVICE, INC. a/t/r FMS. PACA Docket No 2-6511. Decision And Order	316

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

DISCIPLINARY DECISIONS—Cont.

PAGE

GAB PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-6645. Decision And Order	359
GREATER MCCOYS MARKETS, INC PACA Docket No. 2-6396. Decision And Order	330
KAPLANS FRUIT & PRODUCE Co., INC. PACA Docket No. 2-6059. Decision And Order.....	333
LIVESLEY TRADING Co PACA Docket No. 2-6649 Decision And Order...	356
RICHMOND INSTITUTIONAL FOODS INC. PACA Docket No 2-6574 Decision And Order	314
THE SLAW HOUSE, INC PACA Docket No. 2-6570. Decision And Order..	352

REPARATION DECISIONS:

APPLE SALES, INC. v CITY WIDE DISTRIBUTORS, INC PACA Docket No. 2-6423. Decision And Order.. ..	496
B.G. ENTERPRISES, INC. v. COLVIN GIFTS a/t/a COLVIN DISTRIBUTING Co. PACA Docket No. 2-6434. Decision And Order	405
BELRIDGE PACKING Co. v. FIRST QUALITY FRUIT AND PRODUCE Co INC. and/or C.H. ROBINSON Co PACA Docket No. 2-6451. Decision And Order.....	579
BIG RED TOMATO PACKERS v. SCHERER & LUNDY PRODUCE. PACA Docket No. 2-6555. Decision And Order.....	415
BORELLI PRODUCE DISTRIBUTORS v. CITY WIDE DISTRIBUTORS INC. PACA Docket No. 2-6488. Decision And Order.....	566
BRINGS Co , THE, HRDLECKA DAIRY CATTLE, INC. a/t/a HRDLICKA BROS. PRODUCE Co. PACA Docket No. 2-6684	404
BUD ANTLE, INC. v. EMERSON H ELLIOTT d/b/a EMERSON ELLIOTT PRODUCE PACA Docket No 2-6699. Reparation Order.....	467
BUD FARMS, INC v. MELONS INC. PACA Docket No. 2-6489 Decision And Order	423
BULL & PRICE, INC. a/t/a ALLAN BULL PRODUCE v. CITY WIDE DISTRIBUTORS INC. PACA Docket No 2-6462 Decision And Order	554
BUSHMAN'S, INC. v JAMES S CLEMONS JR. and JAMES S. CLEMONS SR. d/b/a ORLANDO PRODUCE DISTRIBUTORS. PACA Docket No. 2-6383 Decision And Order.	446
CARL DOBLER & SONS v A&J PRODUCE CORPORATION PACA Docket No. 2-6478	376
CAROLINA PACKERS v. EMERSON H. ELLIOTT d/b/a EMERSON ELLIOTT PRODUCE. PACA Docket No. 2-6700. Reparation Order	488
GIBSON.....	400
CORRY BROKERAGE v. CITY WIDE DISTRIBUTORS INC. PACA Docket No. 2-6578. Decision And Order.	589
DENNIS PRODUCE SALES, INC. v CITY WIDE DISTRIBUTORS, INC. PACA Docket No 2-6422. Decision And Order.....	489
DONALD F NICOLAUS, d/b/a D-N PRODUCE v. CITY WIDE DISTRIBUTORS, INC PACA Docket No 2-6421. Decision And Order.....	481
DYNASTY FARMS, INC v. M LEVIN & Co. INC PACA Docket No 2-6426. Decision And Order.	442

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DECISIONS—Cont.

PAGE

E VEGA AND SONS, INC. v. MERCEDES PRODUCE CO. PACA Docket No. 2-6194. Decision And Order.....	427
GOLD COAST PACKING, INC. v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6474. Decision And Order..	503
GULF LAKE PRODUCE CO. v. STANLEY & JOE RUSSO PACA Docket No. 2-6583. Decision And Order	576
GROWERS PACKING COMPANY v. EMERSON II. ELLIOTT d/b/a EMERSON ELLIOTT PRODUCE. PACA Docket No. 2-6706 ..	606
HARDEN FARMS OF CALIFORNIA v. ANGELO DI GIANCOMO PACA Docket No. 2-6402. Decision And Order ..	373
HENRY T. JACOBS v. KOSTER ENTERPRISES PRODUCE PACKING DIVISION, INC. PACA Docket No. 2-6531. Decision And Order	464
H.M. DISTRIBUTORS v. VAN BUREN COUNTY FRUIT PACA Docket No. 2-6557. Decision And Order.....	528
THE HUBBARD COMPANY v. GEORGE DI PAOLI DISTRIBUTING COMPANY. PACA Docket No. 2-6580. Decision And Order.	594
J.A. WOOD CO-VISTA, INC. v. BILLINGSLEY FARMS, INC PACA Docket No. 2-6405. Decision And Order	421
JACK T. BAILLIE CO, INC v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6424. Decision And Order	547
J-B DISTRIBUTING CO. v. CITY WIDE DEVELOPERS, INC. PACA Docket No. 2-6386. Decision And Order	515
JOE PHILLIPS, INC v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6485. Decision And Order.....	468
JOS. CIMINO FOODS, INC. v. PRIME PAC, INC. PACA Docket No. 2-6548. Decision And Order ...	450
KAPLANS FRUIT & PRODUCE CO, INC v. HOULEHAN, INC PACA Docket No. 2-6495. Decision And Order	370
KING PACKING v. CITY WIDE DISTRIBUTORS, INC PACA Docket No. 2-6501. Decision And Order.....	602
LINDEMANN FARMS, INC v. INTERNATIONAL A. & G., INC. PACA Docket No. 2-6172. Decision And Order.....	388
LOUIS BOURGOINE JR. v. INTERSTATE FOOD PROCESSING CORP. PACA Docket No. 2-6561. Decision And Order.....	572
MARK L. HANESS d/b/a C.J's BROKERAGE. v. REX E. SPARKS PRODUCE INC. PACA Docket No. 2-6594. Decision And Order.....	452
MACDONALD IMPORT CO., INC v. MAGNOLIA FRUIT AND PRODUCE CO PACA Docket No. 2-6590. Decision And Order	545
MENDELSON-ZELLER CO., INC. v. PURITY SUPREME, INC. PACA Docket No. 2-6443. Decision And Order	364
M&M PRODUCE FARMS AND SALES v. SOL SALINS, INC. PACA Docket No. 2-6525. Decision And Order	541
PACIFIC VALLEY PRODUCE CO v. THE GARIN COMPANY. PACA Docket No. 2-6477. Decision And Order	414
PAPPAS AND CO. v. RALPH & CONO COMMUNALE PRODUCE CORP. PACA Docket No. 2-6504. Decision And Order.....	586

*Reported in this issue.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DECISIONS—Cont.

PAGE

PAT DISTRIBUTING CO OF CALIFORNIA INC v STANLEY & JOE RUSSO PACA Docket No 2-6571 Decision And Order	418
SALINAS LETTUCE FARMERS COOPERATIVE v GREGORY A PLASKETT d/b/ a PACIFIC VALLEY PRODUCE, PACA Docket No 2-6483 Decision And Order.	524
SEABOARD PRODUCE DISTRIBUTORS, INC v CITY WIDE DISTRIBUTORS, INC PACA Docket No 2-6471 Decision And Order	559
SEQUOIA ENTERPRISES, INC v CITY WIDE DISTRIBUTORS, INC PACA Docket No 2-6600, Decision And Order	597
SIN-SON PRODUCE CO, INC v TOM LANGE COMPANY, INC PACA Docket No 2-6439, Decision And Order.... .	409
SMITH FOOD SALES, INC v TRADE WEST MERCHANDISING, INC PACA Docket No 2-6486	367
STEVCO, INC. v MICHAEL BROS INC PACA Docket No 2-6534, Decision And Order	584
SUN WORLD INTERNATIONAL, INC v. M.G. SYRACUSE & SUNS PRODUCE, INC. PACA Docket No 2-6566 Decision And Order... .	532
TANITA FARMS, INC. v. CITY WIDE DISTRIBUTORS, INC PACA Docket No 2-6440, Decision And Order.... .	509
TEIXEIRA FARMS, INC v CITY WIDE DISTRIBUTORS, INC. PACA Docket No 2-6479 Decision And Order... .	536
TOGNOZZINI SUPPLY, INC. v CITY WIDE DISTRIBUTORS, INC PACA Docket No 2-6419 Decision and Order	456
VANCO PRODUCTS, Co., INC. v MAGIC CITY PRODUCE COMPANY, INC. PACA Docket No. 2-6554 Decision And Order	522
WALTERS PRODUCE, INC. v FRANCES PRODUCE CO PACA Docket No. 2- 6025 Order On Reconsideration	380
W.H. McLEOD AND SON v THE CHARLESTON COUNTY WHOLESALE VEGE- TABLE MARKET, INC PACA Docket No 2-6707 .. .	540
YAKIMA FRUIT AND STORAGE CO. v. CITY WIDE DISTRIBUTORS, INC PACA Docket No 2-6412 Decision And Order .. .	476

MISCELLANEOUS REPARATION ORDERS:

BLUE ANCHOR, INC. v SO CENTRAL BROKERAGE, INC and RODOLFO RUBIO d/b/a GATEWAY PRODUCE CO PACA Docket No 2-6380. Ruling On Reconsideration	609
BUD ANTLE, INC v PETER CONAKES COMPANY, INC PACA Docket No 2-6627 Order Of Dismissal	608
D'ARRIGO BROS Co OF CALIFORNIA v PLAINVILLE PRODUCE PACA Docket No. 2-6297 Ruling On Reconsideration .. .	610
GIBSON, CHARLES W, DAN M JOHNSTON and GERALD A. JOHNSTON d/ b/a JOHNSTON-GIBSON SALES Co v FELDMAN BROTHERS PRODUCE, INC PACA Docket No. 2-6249 Ruling On Reconsideration.	616
GOLD COAST PACKING v H SCHNELL AND COMPANY, INC and/or LLOYD MEYERS, Co, INC PACA Docket No 2-6414 Stay Order And Extension Of Time For Filing Petition To Rehear, Reargue, And Recon- sider.	613

*Reported in this issue.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

MISCELLANEOUS REPARATION ORDERS—Cont.

PAGE

HANESS MARK L. d/b/a C.J.'s BROKERAGE <i>v</i> REX E. SPARKS, PRODUCE INC PACA Docket No 2-6594, Order On Reconsideration	615
HOMESTEAD TOMATO PACKING Co, INC <i>v</i> TOMATOES, INC. PACA Docket No 2-6521 Order On Reconsideration	609
NORDEN FRUIT COMPANY a/t/a CAL-FRUIT <i>v</i> D.J. FORRY Co, INC PACA Docket No 2-6337 Order Vacating Stay And Reinstating Prior Order	611
RENE PRODUCE DISTRIBUTORS, INC <i>v</i> BG ENTERPRISES, INC. a/t/a BG SALES PACA Docket No. 2-6558 Order.....	614
STEVCO, INC. <i>v</i> NORDEN FRUIT Co a/t/a CAL-FRUIT PACA Docket No 2-6272 Order Of Dismissal....	610
SUNVALLEY PACKING Co. <i>v</i> C.H. ROBINSON COMPANY PACA Docket No 2-6672 Order Of Dismissal	614
TOM BENGARD RANCH, INC <i>v</i> MUTUAL PRODUCE, INC PACA Docket No 2-6349 Order Granting Reconsideration And Amending Prior Order	612
TOMATOES, INC <i>v</i> STANLEY and JOE RUSSO. PACA Docket No. 2-6335. Order On Reconsideration	608
WENATCHEE WENOKA GROWERS ASSOCIATION INC. <i>v</i> ANTHONY J. D'ACQUISTO d/b/a TROPIC BANANA Co. PACA Docket No. 2-6236 Order On Reconsideration	607

REPARATION DEFAULT DECISIONS:

ASSOCIATED AMERICAN PRODUCE SALES <i>v</i> JOE N. RUSSO PACA Docket No RD-85-25 Order Vacating Stay, Reinstating Default Order	630
B.G. HARMON FRUIT COMPANY, INC <i>v</i> DANNY HAWKINS and TOMMY HAWKINS d/b/a HAWKINS & HAWKINS PRODUCE Co. PACA Docket No. RD-85-114	626
BLUE CREST BLUEBERRY GROWERS ASSOCIATION COOP., INC. <i>v</i> STANLEY & JOE RUSSO. PACA Docket No. RD-85-102	621
37-38 BRONX TERMINAL PRODUCE, INC. a/t/a LAS VILLAS <i>v</i> LAS VILLAS DE NEW JERSEY, INC. d/b/a MIOLLER PRODUCE. PACA Docket No. RD-85-95	622
BUSHMAN's, INC. <i>v</i> CHARLES M. YOUNG. PACA Docket No RD-85-74...	619
CAPERS ISLAND FARM, INC. <i>v</i> CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE Co. PACA Docket No. RD-85-85	618
CAROLINA PACKERS <i>v</i> CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE Co. PACA Docket No. RD-85-96	622
CLARENCE W ROBINSON d/b/a ROBINSON FARMS <i>v</i> MICHAEL BROTHERS, INC. PACA Docket No. RD-85-84. Stay Order	632
CLARENCE W. ROBINSON d/b/a ROBINS FARMS <i>v</i> MICHAEL BROS., INC. PACA Docket No. RD-85-84	617
CONSOLIDATED MARKETING, INC. <i>v</i> DAVEY BROS., INC. PACA Docket No. RD-85-99.....	621
CRANE, RICHARD C. <i>v</i> HEIDEMA FRUIT AND PRODUCE COMPANY PACA Docket No. RD-85-50. Stay Order	628

*Reported in this issue

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont.

PAGE

EDINBURG FRUIT & VEGETABLE CO., INC. v C&R PRODUCE CO. PACA Docket No. RD-85-98.....	622
F&L ENTERPRISES, INC. v. T.J. POWER & COMPANY PACA Docket No. RD-85-64 Stay Order	629
FLORIDA TOMATO PACKERS, INC. v. STANLEY and JOE RUSSO. PACA Docket No. RD-85-15. Order On Request To Reopen After Default ...	630
GIUMARRA VINEYARDS CORPORATION, v. FRANK MARCHESOTTO COMPANY INC. PACA Docket RD-85-110	625
GROWERS PACKING COMPANY v. FERNANDO'S, INC. PACA Docket No. RD-85-106..	624
GROWERS PACKING COMPANY v. JOSEPH A. CUTTONE CO., PACA Docket No. RD-85-83	618
GRIFFIN-HOLDER CO v. RONNIE ADAMS d/b/a C&R PRODUCE CO. PACA Docket No. RD-85-88.....	621
HALL & COLE PRODUCE, INC. v. BEACON FRUIT & PRODUCE CO., INC. PACA Docket No. RD-85-112	625
HENRY AVOCADO PACKING CORPORATION v. FERNANDO'S, INC. PACA Docket No. RD-85-107	624
HUNTS POINT TOMATO CO., INC. v. D. FAVA, INC. PACA Docket No. RD-85-66 Order Of Dismissal ...	628
INTERNATIONAL FRESH AND FROZEN FOODS, INC. v. JIMNI TRADING COMPANY. PACA Docket No. RD-84-475. Order Reopening After Default	627
I.R. JEROME COMPANY LTD v. MAX KAUFMAN INC. PACA Docket No. RD-85-77.	619
JOE PHILLIPS & ASSOCIATES, INC. v. ASIAN TRADING COMPANY, LTD. PACA Docket No. RD-85-79 ...	619
J.S. McMANUS PRODUCE CO., INC. v. ANDY'S PRODUCE CO. PACA Docket No. RD-85-117	626
J.R. NORTON COMPANY v. ARMANDO CARDENAS d/b/a THE ALL AMERICAN CITY PRODUCE CO a/t/a ELIAS CARDENAS PRODUCE PACA Docket No. RD-85-97.....	622
J.R. NORTON COMPANY v. TAYLOR-BYERS, INC. PACA Docket No. RD-85-101..	621
MARVIN SCHWARZ PRODUCE v. JERRY G. LOWE d/b/a LOWE FRUIT & PRODUCE PACA Docket No. RD-85-86.	618
MATARAZZO BROS. CO. v. BEACON FRUIT & PRODUCE CO., INC. PACA Docket No. RD-85-111.	625
M.G. HURD AND SONS, INC. v. JOHN A. DEANDRESSI d/b/a TROPICANA BANANA CO. PACA Docket No. RD-85-61 Order of Dismissal	628
MONTEREY AGRICULTURAL PRODUCTS, INC. v. LAKE CITY WHOLESALE FOODS & PRODUCE PACA Docket No. RD-85-94.....	623
NEO'S MOODY CREEK PRODUCE, INC. v. PRIME PAC INC a/t/a J&S POTATO COMPANY. PACA Docket No. RD-85-113.. ..	625
NEW WEST FOODS v. FEDERATED FOODS, INC. PACA Docket No. RD-85-47. Stay Order	627
PEREZ RANCHES, INC. a/t/a P.R.I. SALES CO. v. GRAYSON E. LEWIS d/b/a A TOMATO OF VA PACA Docket No. RD-85-73.....	618

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont.

PAGE

PRODUCE DISTRIBUTORS, INC. v MICHAEL BROTHERS, INC. PACA Docket No RD-85-93 Stay Order	631
PRODUCE DISTRIBUTORS, INC. v MICHAEL BROS., INC. PACA Docket No. RD-85-93.	623
PURE GOLD, INC. v. FERNANDO'S, INC PACA Docket No. RD-85-108 ...	624
REX MUSHROOMS, INC. v. LAKE CITY WHOLESALE FOODS & PRODUCE. PACA Docket RD-85-69....	617
RIGBY PRODUCE v. CHINO'S PRODUCE, INC and/or STEPHEN J WEIDENBAKER d/b/a STEVE'S BROKERAGE PACA Docket RD-85-103.....	623
RISING STAR BROKERAGE, INC v DORFMAN PRODUCE CO., INC PACA Docket No. RD-85-89.	620
ROCKY PRODUCE, INC. v MID CITY WHOLESALE PRODUCE CO. PACA Docket RD-85-71	617
ROGER HARLOFF PACKING, INC v. CARL D CUTTONE d/b/a JOSEPH A CUTTONE CO. PACA Docket No. RD-85-72	618
RUSCONI FARMS a/t/a CAL-SWISS FOODS v. PRIME-PAC, INC PACA Docket No. RD-85-87	620
SAM WANG FOOD CORP., INC. v. MANASSAS PRODUCE COMPANY, INC. PACA Docket RD-85-81.	620
SAN MIGUEL PRODUCE, INC v. JOSEPH D. MOCERI PRODUCE, INC PACA Docket No RD-85-6.....	625
SEQUOIA ENTERPRISES, INC. v. JOE N. RUSSO and STANLEY RUSSO d/b/a STANLEY & JOE RUSSO. PACA Docket No. RD-85-92.....	622
SIGMA PRODUCE CO., INC v MAX KAUFMAN, INC PACA Docket No RD-85-75.	619
SIX L'S PACKING COMPANY, INC. v. CLARKTON TOMATO HOUSE. PACA Docket No RD-85-90.	621
SIX L'S PACKING COMPANY, INC. v. MBI ROZIER. PACA Docket No RD-85-115.....	626
SOUTHLAND PRODUCE COMPANY a/t/a WESTERN FRUIT SALES CO. v. FRANK MARCHESOTTO COMPANY INC. PACA Docket No. RD-85-109 ..	624
SOUZA BROS. PACKING CO. v LAKE CITY WHOLESALE FOODS & PRODUCE. PACA Docket No. RD-85-80.	620
STONACA FARMS CORPORATION v PURITY SUPREME INC. PACA Docket No. RD-85-91. Order Of Dismissal	631
TEX-CAL LAND, INC. v JOE N RUSSO and STANLEY RUSSO d/b/a STANLEY and JOE RUSSO PACA Docket No. RD-85-23. Order Vacating Stay Order, Reinstating Default Order	629
THOMPSON BROKERAGE COMPANY, INC. v. BATESVILLE PRODUCE CO. PACA Docket No. RD-85-116	626
TIP TOP GROWERS AND PACKERS v. FERNANDO'S, INC. PACA Docket No. RD-85-105.....	624
UCON PRODUCE, INC. v. B & E PRODUCE INC. PACA Docket No. RD-85-76.....	619
VALDES FARMS, INC. v. TAVERA FRUIT IMPORT, INC. PACA Docket No. RD-85-68	617

*Reported in this issue.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont.

PAGE

VALLEY ONIONS, INC v. FRANK MARCHESOTTO COMPANY, INC. PACA Docket No. RD-85-104.	623
WALTERS PRODUCE, INC v. SOUTHWEST PRODUCE, INC. PACA Docket No RD-85-67	617
WOODS COMPANY INCORPORATED, THE. v. GWENDOLYN V CARELLO and ELAINE M PAVIA d/b/a LAKE CITY WHOLESALE FOODS & PRODUCE. PACA Docket No. RD-85-100	621
YANCICH v. HEIDEMA FRUIT AND PRODUCE COMPANY PACA Docket No RD-85-78	619

PLANT QUARANTINE ACT

ALBERTINE LAKE. PQ Docket No. 32. Order Dismissing Complaint	633
EASTERN AIRLINES, INC PQ Docket No 2. Consent Decision....	634
HOWELL, MARK and NORTH AMERICAN VAN LINES, INC PQ Docket No. 16 Order Dismissing Complaint As To Mark Howell	638
JINENEZ, RAUL D. and LUIS S. FEYT. PQ Docket No. 7. Decision And Order.....	636
KARTHOUSE, RICHARD and ALLIED VAN LINES PQ Docket No. 28 Order Dismissing Complaint..	633
KILLINGSWORTH, PHILLIP. PQ Docket No. 13. Order Of Dismissal ...	634
LOURDES, ANA. PQ Docket No. 35. Order Of Dismissal.	640
NORTH AMERICAN VAN LINES. PQ Docket No. 16. Consent Decision.....	639
RAGONTON, VICTOR QUINOPOS. PQ Docket No. 29. Order Of Dismissal ..	634
SOKALSKY, ROBERT and GLOBAL VAN LINES, INC. PQ Docket No. 19. Order Of Dismissal.	633
TRIANGLE AVIATION SERVICES. PQ Docket No 12 and 33 Consent Decision	641
UNITED VAN LINES, INC. PQ Docket No. 18. Order Of Dismissal.....	636

In re: DEFIANCE MILK PRODUCTS COMPANY, A DIVISION OF DIEHL, INC. AMA Docket No. M33-3. Decided January 24, 1985.

Challenge to validity of temporary amendment to milk marketing Order—Reversal of award—Dismissal.

The Judicial Officer reversed Judge Palmer's decision holding that petitioner was owed \$68,000 by the Market Administrator of Order No 33, regulating the handling of milk in the Ohio Valley marketing area. The Secretary's temporary, two-month amendment created, in effect, a new Class III(A), consisting of butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), priced 40 cents lower than Class III. Substantial evidence supports the temporary amendment. Substantial evidence did not support including evaporated milk in the new Class III(A), but even if it did, the Secretary's decision not to include evaporated milk in Class III(A) was not arbitrary, capricious or an abuse of discretion. The Secretary's action is justified by § 8c(5)(A) and 8c(7)(D) of the Act. Absolute equality and complete equity is not required in Federal Milk Marketing Orders. Particular weight should be given to administrative expertise in the field of milk marketing. The issue is whether substantial evidence supports the *inclusion* of evaporated milk in Class III(A)—not whether substantial evidence supports the *exclusion* of evaporated milk. The Secretary need not take ultimate consumer use of milk products into account in classifying milk. The existence of regulatory alternatives is not cognizable on review. The responsibility for selecting the best means of achieving the statutory policy is peculiarly a matter of administrative competence. The Secretary's rule-making action must be judged solely by the evidence at the rulemaking hearing rather than the 8c(15)(A) hearing. If the Secretary's temporary rulemaking action were found unlawful, the proper course would be to remand the matter to the Secretary for lawful action, rather than to award damages to petitioner. If damages had been awarded to petitioner, interest would not have been appropriate.

Marvin Beshore, Harrisburg, Pennsylvania, for petitioner.

Alexandra Maravel, for respondent.

Victor W. Palmer, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This proceeding was instituted under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)),¹ by petitioner challenging the validity of a tempo-

¹ (15) *Petition by handler for modification of order or exemption; court review of ruling of Secretary*

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont.

PAGE

EDINBURG FRUIT & VEGETABLE CO., INC v C&R PRODUCE CO. PACA Docket No RD-85-98	622
F&L ENTERPRISES, INC v T.J. POWER & COMPANY PACA Docket No RD-85-64 Stay Order.....	629
FLORIDA TOMATO PACKERS, INC. v STANLEY and JOE RUSSO. PACA Docket No RD-85-15. Order On Request To Reopen After Default ..	630
GIUMARRA VINEYARDS CORPORATION, v. FRANK MARCHESOTTO COMPANY INC. PACA Docket RD-85-110	625
GROWERS PACKING COMPANY v FERNANDO'S, INC. PACA Docket No RD-85-106.....	624
GROWERS PACKING COMPANY v JOSEPH A CUTTONE CO., PACA Docket No RD-85-83	618
GRIFFIN-HOLDER CO. v RONNIE ADAMS d/b/a C&R PRODUCE CO PACA Docket No. RD-85-88.....	621
HALL & COLE PRODUCE, INC. v BEACON FRUIT & PRODUCE CO., INC PACA Docket No. RD-85-112	625
HENRY AVOCADO PACKING CORPORATION v FERNANDO'S, INC. PACA Docket No. RD-85-107.. ..	624
HUNTS POINT TOMATO CO., INC v D. FAVA, INC PACA Docket No. RD-85-66. Order Of Dismissal	628
INTERNATIONAL FRESH AND FROZEN FOODS, INC v. JIMNI TRADING COMPANY. PACA Docket No. RD-84-475. Order Reopening After Default	627
I.R. JEROME COMPANY LTD. v MAX KAUFMAN INC PACA Docket No. RD-85-77.....	619
JOE PHILLIPS & ASSOCIATES, INC. v. ASIAN TRADING COMPANY, LTD. PACA Docket No RD-85-79 ..	619
J.S. McMANUS PRODUCE CO., INC v ANDY'S PRODUCE CO. PACA Docket No RD-85-117.	626
J.R. NORTON COMPANY v ARMANDO CARDENAS d/b/a THE ALL AMERICAN CITY PRODUCE CO. a/t/a ELIAS CARDENAS PRODUCE PACA Docket No. RD-85-97	622
J R NORTON COMPANY v. TAYLOR-BYERS, INC. PACA Docket No. RD-85-101.	621
MARVIN SCHWARZ PRODUCE v. JERRY G LOWE d/b/a LOWE FRUIT & PRODUCE. PACA Docket No RD-85-86	618
MATARAZZO BROS. Co. v BEACON FRUIT & PRODUCE CO., INC. PACA Docket No RD-85-111.	625
M G HURD AND SONS, INC. v. JOHN A. DEANDRESSI d/b/a TROPICANA BANANA Co. PACA Docket No. RD-85-61 Order of Dismissal	628
MONTEREY AGRICULTURAL PRODUCTS, INC. v. LAKE CITY WHOLESALE FOODS & PRODUCE PACA Docket No. RD-85-94.....	623
NED'S MOODY CREEK PRODUCE, INC v. PRIME PAC INC. a/t/a J&S POTATO COMPANY. PACA Docket No RD-85-113.....	625
NEW WEST FOODS v FEDERATED FOODS, INC. PACA Docket No. RD-85-47. Stay Order	627
PEREZ RANCHES, INC. a/t/a P R I. SALES Co. v GRAYSON E. LEWIS d/b/a TOMATO OF VA PACA Docket No. RD-85-73	618

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont.

PAGE

PRODUCE DISTRIBUTORS, INC. v. MICHAEL BROTHERS, INC. PACA Docket No. RD-85-93 Stay Order	631
PRODUCE DISTRIBUTORS, INC. v. MICHAEL BROS., INC. PACA Docket No. RD-85-93.....	623
PURE GOLD, INC. v. FERNANDO'S, INC. PACA Docket No. RD-85-108 ..	624
REX MUSHROOMS, INC. v. LAKE CITY WHOLESALE FOODS & PRODUCE. PACA Docket RD-85-69.....	617
RIGBY PRODUCE v. CHINO'S PRODUCE, INC. and/or STEPHEN J. WEIDENBAKER d/b/a STEVE'S BROKERAGE. PACA Docket RD-85-103	623
RISING STAR BROKERAGE, INC. v. DORFMAN PRODUCE CO., INC. PACA Docket No. RD-85-89 ..	620
ROCKY PRODUCE, INC. v. MID CITY WHOLESALE PRODUCE CO. PACA Docket RD-85-71	617
ROGER HARLOFF PACKING, INC. v. CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE CO. PACA Docket No. RD-85-72	618
RUSCONI FARMS a/l/a CAL-SWISS FOODS v. PRIME-PAC, INC. PACA Docket No. RD-85-87	620
SAM WANG FOOD CORP., INC. v. MANASSAS PRODUCE COMPANY, INC. PACA Docket RD-85-81 ..	620
SAN MIGUEL PRODUCE, INC. v. JOSEPH D. MOCERI PRODUCE, INC. PACA Docket No. RD-85-6 ..	625
SEQUOIA ENTERPRISES, INC. v. JOE N. RUSSO and STANLEY RUSSO d/b/a STANLEY & JOE RUSSO. PACA Docket No. RD-85-92.....	622
SIGMA PRODUCE CO., INC. v. MAX KAUFMAN, INC. PACA Docket No. RD-85-75	619
SIX L'S PACKING COMPANY, INC. v. CLARKTON TOMATO HOUSE. PACA Docket No. RD-85-90	621
SIX L'S PACKING COMPANY, INC. v. MBI ROZIER. PACA Docket No. RD-85-115	626
SOUTHLAND PRODUCE COMPANY a/t/a WESTERN FRUIT SALES CO. v. FRANK MARCHESOTTO COMPANY INC. PACA Docket No. RD-85-109 ...	624
SOUZA BROS. PACKING CO. v. LAKE CITY WHOLESALE FOODS & PRODUCE. PACA Docket No. RD-85-80 ..	620
STONACA FARMS CORPORATION v. PURITY SUPREME INC. PACA Docket No. RD-85-91. Order Of Dismissal ..	631
TEX-CAL LAND, INC. v. JOE N. RUSSO and STANLEY RUSSO d/b/a STANLEY and JOE RUSSO. PACA Docket No. RD-85-23. Order Vacating Stay Order, Reinstating Default Order	629
THOMPSON BROKERAGE COMPANY, INC. v. BATESVILLE PRODUCE CO. PACA Docket No. RD-85-116 ..	626
TIP TOP GROWERS AND PACKERS v. FERNANDO'S, INC. PACA Docket No. RD-85-105	624
UCON PRODUCE, INC. v. B & E PRODUCE INC. PACA Docket No. RD-85-76	619
VALDES FARMS, INC. v. TAVERA FRUIT IMPORT, INC. PACA Docket No. RD-85-68	617

*Reported in this issue.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

REPARATION DEFAULT DECISIONS—Cont.	PAGE
VALLEY ONIONS, INC. v FRANK MARCHESOTTO COMPANY, INC. PACA Docket No. RD-85-104	628
WALTERS PRODUCE, INC. v. SOUTHWEST PRODUCE, INC. PACA Docket No RD-85-67	617
WOODS COMPANY INCORPORATED, THE. v GWENDOLYN V CARELLO and ELAINE M PAVIA d/b/a LAKE CITY WHOLESALE FOODS & PRODUCE. PACA Docket No. RD-85-100	621
YANCICH v. HEIDEMA FRUIT AND PRODUCE COMPANY. PACA Docket No. RD-85-78.	619

PLANT QUARANTINE ACT

ALBERTINE LAKE PQ Docket No. 32. Order Dismissing Complaint	633
EASTERN AIRLINES, INC PQ Docket No 2 Consent Decision	634
HOWELL, MARK and NORTH AMERICAN VAN LINES, INC. PQ Docket No. 16. Order Dismissing Complaint As To Mark Howell	638
JINENEZ, RAUL D and LUIS S. FEYT. PQ Docket No. 7. Decision And Order	636
KARTHOUSE, RICHARD and ALLIED VAN LINES. PQ Docket No. 28 Order Dismissing Complaint	633
KILLINGSWORTH, PHILLIP. PQ Docket No 13. Order Of Dismissal	634
LOURDES, ANA PQ Docket No 35 Order Of Dismissal.....	640
NORTH AMERICAN VAN LINES. PQ Docket No 16. Consent Decision.....	639
RAGONTON, VICTOR QUINOPOS PQ Docket No 29. Order Of Dismissal....	634
SOKALSKY, ROBERT and GLOBAL VAN LINES, INC. PQ Docket No 19. Order Of Dismissal	633
TRIANGLE AVIATION SERVICES. PQ Docket No. 12 and 33 Consent Decision	641
UNITED VAN LINES, INC. PQ Docket No. 18 Order Of Dismissal.....	636

In re: DEFIANCE MILK PRODUCTS COMPANY, A DIVISION OF DIEHL, INC. AMA Docket No. M33-3. Decided January 24, 1985.

Challenge to validity of temporary amendment to milk marketing Order—Reversal of award—Dismissal.

The Judicial Officer reversed Judge Palmer's decision holding that petitioner was owed \$68,000 by the Market Administrator of Order No. 33, regulating the handling of milk in the Ohio Valley marketing area. The Secretary's temporary, two-month amendment created, in effect, a new Class III(A), consisting of butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), priced 40 cents lower than Class III. Substantial evidence supports the temporary amendment. Substantial evidence did not support including evaporated milk in the new Class III(A), but even if it did, the Secretary's decision not to include evaporated milk in Class III(A) was not arbitrary, capricious or an abuse of discretion. The Secretary's action is justified by § 8c(5)(A) and 8c(7)(D) of the Act. Absolute equality and complete equity is not required in Federal Milk Marketing Orders. Particular weight should be given to administrative expertise in the field of milk marketing. The issue is whether substantial evidence supports the *inclusion* of evaporated milk in Class III(A)—not whether substantial evidence supports the *exclusion* of evaporated milk. The Secretary need not take ultimate consumer use of milk products into account in classifying milk. The existence of regulatory alternatives is not cognizable on review. The responsibility for selecting the best means of achieving the statutory policy is peculiarly a matter of administrative competence. The Secretary's rule-making action must be judged solely by the evidence at the rulemaking hearing rather than the 8c(15)(A) hearing. If the Secretary's temporary rulemaking action were found unlawful, the proper course would be to remand the matter to the Secretary for lawful action, rather than to award damages to petitioner. If damages had been awarded to petitioner, interest would not have been appropriate.

Marvin Beshore, Harrisburg, Pennsylvania, for petitioner.

Alexandra Maravel, for respondent

Victor W. Palmer, Administrative Law Judge

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This proceeding was instituted under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)),¹ by petitioner challenging the validity of a tempo-

¹ (15) *Petition by handler for modification of order or exemption; court review of ruling of Secretary*

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

rary, 2-month amendment to milk marketing Order No. 33, regulating the handling of milk in the Ohio Valley Marketing Area (7 CFR Part 1033). (The temporary amendment also applied to Order 36 involving the Eastern Ohio-Western Pennsylvania Marketing Area.)

The temporary, 2-month amendment created, in effect, a new class of milk (Class III(A)) for milk used to make butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), which products were formerly in Class III (along with 15 other products, including evaporated milk), and decreased the price for the new, lowest class by 40¢ per hundredweight from the price of Class III, previously the lowest class.

Petitioner, a handler which makes evaporated milk, challenges the temporary, 2-month amendment on the grounds that it is not supported by substantial evidence; it is not authorized by the Act because it violates the requirement of uniform pricing of milk among handlers of the same class of milk; it is arbitrary, capricious and an abuse of discretion; and it unlawfully discriminates against petitioner. Petitioner requests the Secretary to modify the temporary, 2-month amendment to include evaporated milk in the 40¢ price change effected by the amendment, and to pay petitioner \$68,011.44, plus interest, for the milk petitioner used during the 2 months to make evaporated milk.

On October 15, 1984, Administrative Law Judge Victor W. Palmer (ALJ) filed an initial decision and order in which he held that the petitioner was entitled to the relief requested, except for interest. He denied petitioner's request to escrow the refund awarded, pending appeal.

Both respondent and petitioner appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).² The case was referred to the Judicial Officer for decision on January 2, 1985.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 900.65(b)(1)), was requested by petitioner, but is denied in-

² The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

asmuch as the issues on appeal have been thoroughly briefed and oral argument would not seem to be helpful.

For the reasons set forth below, the temporary, 2-month amendment was in accordance with law, and the petition should be dismissed on the merits.

Milk marketing orders issued under the Act provide for the classification of milk in accordance with the form in which or the purpose for which it is used, and the payment to all producers delivering milk to all handlers under a particular order of uniform minimum prices for all milk so delivered. In general terms, before the temporary 2-month amendment, Order No. 33 involved here classified milk disposed of in fluid form as the highest value class, Class I, milk disposed of in soft products such as eggnog and yogurt in Class II, and milk used to produce hard products, such as cheese and butter, in Class III, the lowest value class. The temporary 2-month amendment created, in effect, a new Class III(A) priced 40¢ lower than Class III.

The procedure for paying producers and charging handlers for milk is generally as follows (*Grant v. Benson*, 229 F.2d 765, 767 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956)):

The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions. . . . The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform [blend] price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.³

³ Under Order No. 33 and several other orders, the Market Administrator may collect the handler's total class-use obligations and pay producers the blend price,

FINDINGS OF FACT

1. Defiance Milk Products Company (Defiance) is a division of Diehl, Inc., a corporation. Defiance operates a milk processing plant at 24 North Clinton Street, Defiance, Ohio, where producer milk is processed into a number of manufactured products, primarily evaporated whole milk.

2. Defiance was at all times relevant hereto a pool supply plant under the terms of Federal Milk Marketing Order No. 33 (7 CFR § 1033.11).

3. On February 16, 1983, the Deputy Administrator, Marketing Program Operations, Agricultural Marketing Service, USDA, signed and caused to be published on February 22, 1983, a notice of hearing on proposed amendments to Orders 33 and 36 (7 CFR Parts 1033 and 1036), regulating the handling of milk in the Ohio Valley and Eastern Ohio-Western Pennsylvania Marketing Areas (48 Fed. Reg. 7462 (1983)).

4. The notice of hearing sets forth two proposals by a cooperative, Milk Marketing, Inc. (MMI), to amend § 1033.41, .51, of Order No. 33 as follows (48 Fed. Reg. 7462, 7463 (1983)):

Amend § 1033.41 by adding a new paragraph (d) to read as follows:

(d) *Class III(A) milk.* Class III(A) shall be all producer milk used to produce dry milk powder, cheese (except cottage cheese and cottage cheese curd) and butter during the months of April, May, June and July of 1983.

Amend § 1033.51 by adding a new paragraph (d) to read as follows:

(d) *Class III(A) price.* The Class III(A) price for the months of April, May, June and July 1983 shall be the basic formula price [then the Class III price] less 40 cents.

unless the handler requests to make its own payments to producers. In view of the different situations in the various milk marketing areas, there is a wide variation in the pricing provisions of the orders. For a general description of the milk marketing regulatory program under the Act, see *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 78-81 (1962); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 542-45 (1939); *Fairmont Foods Co. v. Hardin*, 442 F.2d 762, 764 (D.C. Cir. 1971). See generally Vetne, "Federal Marketing Order Programs," in 1 *Agricultural Law* ch. 2 (J. Davidson ed.) (1981 and Aug. 1984 Supp.); Brooks, "The Pricing of Milk under Federal Marketing Orders," 26 Geo. Wash. L. Rev. 181 (1958).

5. The summary of the Notice of Hearing states (48 Fed. Reg. 7462 (1983)):

SUMMARY: This hearing is being held to consider proposals by Milk Marketing, Inc. (MMI), to amend the Ohio Valley and Eastern Ohio-Western Pennsylvania milk orders. The proposed amendments would reduce the current price for producer milk used to produce butter, dry milk powder and cheese by 40 cents per hundredweight during the months of April-July 1983. MMI has requested that the proposals be adopted on an expedited basis so that amendments can be made effective beginning April 1983. The cooperative claims that the proposed amendments are needed immediately to prevent disorderly marketing, provide a mechanism for clearing these markets of an unusual surge of milk production, and assure more equitable sharing of the burden of handling this surplus milk.

6. At the time of the temporary rulemaking proceeding, Class III included milk used to make 18 products, including dry milk powder, cheese (except cottage cheese and cottage cheese curd), butter and evaporated milk. The Order provided (7 CFR § 1033.41(c)(1) (1983)):

§ 1033.41 *Classes of utilization.*

* * * * *

(c) *Class III milk.* Class III milk shall be:

(1) Skim milk and butterfat used to produce butter, nonfat dry milk, dry whole milk, dry whey, dry butter-milk, casein, cheese (except cottage cheese and cottage cheese curd), frozen cream, milk shake mixes containing 20 percent or more total solids, frozen desserts, frozen desert mixes, dietary products and infant formulas in hermetically sealed metal or glass containers, evaporated or condensed milk or skim milk in plain or sweetened form, any product containing six percent or more nonmilk fat (or oil), and any product that contains by weight less than 6.5 percent nonfat milk solids.

In addition, Class III milk included (7 CFR § 1033.41(c)(2)-(7) (1983)):

(2) Skim milk and butterfat in fluid milk products [Class I] and [Class II] products listed in paragraphs (b)(1) and (3)

Subject to the provisions of § 1033.53 [containing location differentials], the class price per hundredweight for the month shall be as follows:

* * * * *

(c) *Class III price.* The Class III price shall be the basic formula price for the month.

8.⁴ A hearing on the proposed amendments was held on March 3 and 4, 1983, at Middleburg Heights, Ohio. At the hearing, testimony in support of the published proposed rules establishing a new Class III(A) of usage and a new Class III(A) price cited the following factors:

a. Class I sales of milk were declining;

b. Milk supplies were increasing causing a substantial increase in surplus milk;⁵

c. Most milk surplus to Class I needs has historically moved to manufacturing plants which primarily produce butter, nonfat dry milk and cheese with such surplus;⁶

d. 54.8 million more pounds of milk were processed into butter, nonfat dry milk and cheese [under Order No. 33] during November 1982-January 1983 than during the same period one year before, which was an increase of 34.7%;

e. The proponent cooperative Milk Marketing, Inc., ("MMI"), whose members produce approximately 77% of all milk marketed under the Order, was a major balancer of milk supplies in the Order and was indirectly balancing the surplus milk of non-member producers;

f. MMI was handling 72.9 million more pounds of milk [under Order No. 33] processed into butter, nonfat dry milk and cheese during November 1982-January 1983

⁴ Finding 8 is taken verbatim from the ALJ's Findings 5-8, except that his record references are omitted, and bracketed material and footnotes are added by the Judicial Officer.

⁵ The evidence established that the surplus expected in 1983 was substantially greater than the usual spring surplus encountered in previous years.

⁶ The evidence established that during the spring periods of April-July in 1980 through 1982, 67%, 78% and 87%, respectively, of the Class III milk in Order No. 33 was used to manufacture dry milk powder, cheese (except cottage cheese and cottage cheese curd) and butter (computed from Ex. 5, Table III, and Ex. 8, Table 5).

than during the same period a year before, which was an increase of 77.3%;

g. All other handlers under the Order were handling 28.4% less milk [processed into butter, nonfat dry milk and cheese] during November 1982-January 1983 than during the same period a year before;

h. MMI handled a disproportionate share of the total surplus milk supply [under Order No. 33]; *e.g.*, in January 1983 it handled 81.7% of milk processed into butter, nonfat dry milk and cheese but only 75.9% of the total milk supply in the market;

i. Surplus milk under the Order was processed primarily at six manufacturing plants in Ohio and Indiana, including three non-pool plants, but in 1983 the pool manufacturing plants remaining open were all operating at full capacity necessitating shipments of the increase in surplus in 1983 to non-pool plants within or without the market;

j. Prices offered by non-pool plants in 1982 were substantially below the Class III price for which handlers had to account to the pool for the milk;

k. Projections of prices to be offered by manufacturing plants in 1983 indicated a decline in price from 1982, from which data MMI estimated and projected the following: a 1983 price \$1.17 below the Class III price, an average 22.1¢ per hundredweight ("cwt") loss due to such price for surplus milk sold for use in butter, nonfat dry milk and cheese in Order No. 33 and Order No. 36 combined, and a resulting total price loss of \$1,560,000 for the two markets;

l. Hauling costs incurred by MMI in disposing of surplus milk amounted to \$89,087.00 in April-July 1982;

m. Projections of hauling costs to be incurred in disposing of surplus milk to butter, nonfat dry milk or cheese plants in both markets in the 1983 flush season amounted to 30.6¢ per cwt. on a projected 703,800,000 pounds of milk, *i.e.*, \$2,152,000 in hauling costs for MMI for both markets;

n. The combined loss projected per cwt. to be borne by MMI for surplus milk sold to be used to make butter, nonfat dry milk and cheese in the 1983 flush season was 52.7¢ per cwt.;

- o. Over-order premiums would not be available to offset a 52.7¢ per cwt. marketing loss on surplus milk in the 1983 flush season.

The proponent cooperative, Milk Marketing, Inc. ("MMI"), identified the products in the new Class III(A) as the primary disposition uses for the seasonal surplus. MMI did not propose the inclusion of evaporated whole milk in Class III(A).

9. The evidence summarized in Finding 8, *supra*, establishes that milk used for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) would be substantially reduced in value in the spring of 1983 because substantial amounts of such milk would have to be hauled to nonpool plants manufacturing butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), and sold at prices substantially below Class III prices.

10. John P. Speiser, Vice President of Diehl, Inc. (petitioner's parent corporation), responsible for production and maintaining a supply of milk for petitioner, testified as follows at the rulemaking hearing (Tr. 168-185):

- a. If the MMI proposal [see Finding 4, *supra*] is adopted, the price reduction should apply to milk used for all products in Class III, including evaporated and condensed milk products made by petitioner, even if some Class III products are not expected to be made from the surge of surplus milk (Tr. 170-72);

- b. Milk used for evaporated and condensed milk products were now and had previously been priced equally with milk used to make butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), and evaporated and condensed milk are interchangeable for many uses with dry milk powder and should continue to be priced on the same basis (Tr. 170-71);

- c. Petitioner buys Grade A milk and competes with unregulated evaporated and condensed milk manufacturing plants which buy cheaper, Grade B milk at about \$1.50 per hundredweight less than the Class III price and, thus, have a competitive advantage over petitioner (Tr. 170, 172, 175, 181-82);

- d. Petitioner's purchases of surplus milk in the spring season have been declining in recent years, so that its operation is currently structured to take on more milk in the fall than in the spring. (Tr. 169-70, 179);

e. Petitioner has plant capacity available for additional manufacturing of evaporated whole milk during the surplus period (Tr. 170-71, 173-74), but petitioner does not intend under the *status quo* at the time of the hearing to purchase extra loads of milk from non-usual supply sources during the 1983 flush season (Tr. 176-77);

f. Unless petitioner becomes eligible for the price reduction, it will not buy as much milk in the 1983 flush season as it might if the price is reduced, but petitioner will consider buying more milk if its price is reduced (Tr. 173-74, 177);

g. In the 1982 flush season, petitioner had milk available for its purchase at a price substantially less than the Class III price (Tr. 183).

No witnesses testified in opposition to the inclusion of evaporated milk in the proposed Class III(A).

11. There is no evidence in the rulemaking record that petitioner incurred losses from hauling milk to other plants or from being forced to dispose of a supply of milk surplus to its needs to other plants at prices below the price petitioner had to pay to purchase such milk, or that petitioner expected to incur such losses during the unusual 1983 spring surge in milk production.

There is no evidence that petitioner ever hauled milk to any other plant other than to pool distributing plants to supply the fluid market. (To qualify as a "pool" supply plant, which enabled petitioner to draw from the producer-settlement fund the difference between the manufacturing price and the blend price on all its Grade A milk used for manufactured products, petitioner was required to supply pool distributing plants at least 50% of its receipts during the months of September through February (7 CFR § 1033.12(b) (1983)).

12. There is no evidence in the rulemaking record that petitioner's plant is a primary outlet for excess milk or that it would have definitely taken on any of the increased surplus in 1983, even if evaporated milk had been included in the proposed Class III(A).

There is no evidence in the rulemaking record:

1. That a significant portion of the 1983 surge in surplus would unavoidably be moving to evaporated milk outlets;

2. That market supply and demand pressures were causing the price to drop for Order 33 milk which was moved to evaporated milk outlets; or

3. That either the surge in surplus or the devaluation of surplus milk moving to butter, nonfat dry milk and cheese outlets substantially affected the use of Order 33 milk by handlers of other Class III products, such as evaporated milk.

13. Petitioner filed a brief on April 7, 1983, in the rulemaking proceeding in which it changed its original position, that all Class III products should be included in the proposed amendment, to the position that only evaporated milk and condensed milk should be added to the three products proposed by MMI. In this § 8c(15)(A) proceeding, petitioner only challenges the failure to include evaporated milk in the amendment.

14. On May 13, 1983, the Assistant Secretary, Marketing and Inspection Service, USDA, signed the Final Decision on the proposed rulemaking, which was published on May 18, 1983 (48 Fed. Reg. 22,313 (1983)). A recommended decision, with opportunity to file exceptions, was omitted because of the emergency nature of the amendment.

The Secretary found that the temporary price reduction proposed by MMI was required to remove the inequities and competitive disadvantage involving handlers and cooperatives (such as MMI) who were performing the surplus balancing services in the market. He further found that the temporary price reduction was only necessary for the normal outlets for the seasonal surplus milk on the two markets, namely, butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd).

The Secretary rejected petitioner's proposed price relief for evaporated and condensed milk because there was no evidence that handlers would incur the same types of losses on marketing surplus milk for such uses as would handlers forced to sell increased amounts of surplus milk to nonpool plants, to be processed into butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd).

The Secretary's findings and conclusions are as follows (48 Fed. Reg. 22,313, 22,313-17 (1983)):

1. *Price relief on milk used in hard manufactured products.* The Ohio Valley and Eastern Ohio-Western Pennsylvania orders should be amended to provide a temporary price reduction of 40 cents per hundredweight to handlers for producer milk utilized in the production of butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd). The credits should be made available as soon as possible and should continue through July 1983.

Milk Marketing, Inc. (MMI), a cooperative association of about 7,000 producers who supply about 77 percent of the milk marketed under the Ohio Valley order and about 50 percent of the milk marketed under the Eastern Ohio-Western Pennsylvania order, requested that the orders be amended to lower a handler's obligation to the pool by 40 cents per hundredweight for all producer milk used to make butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) during the months of April, May, June and July 1983. The cooperative indicated that the proposed amendments are needed to offset losses being incurred by handlers in marketing the recent surge in the volume of surplus milk on the markets that is processed into storable manufactured products, primarily butter, nonfat dry milk and cheese.

The MMI witness pointed out that receipts of milk from producers are up substantially while producer milk classified as Class I has declined. Consequently, with production and Class I sales moving in opposite directions, there is a substantial increase in the amount of milk in the two markets that is not needed by pool distributing plants. This milk must be disposed of to manufacturing plants with the highest volumes coming during the seasonally high production months of April, May, June and July. The witness stated that historically, the milk not needed by pool distributing plants in these markets has been moved to manufacturing plants that primarily produce butter, nonfat dry milk and cheese.

The proponent cooperative indicated that it is marketing a disproportionate share of the increased volume of milk being moved to manufacturing plants. The cooperative spokesman entered an exhibit showing the pounds of producer milk used to manufacture butter, nonfat dry milk and cheese in each of the markets and the amounts handled by MMI. The exhibit shows that for the Ohio Valley market in 1980 MMI handled 46.8 percent of the milk that was utilized to produce butter, nonfat dry milk and cheese. In 1981 this increased to 61.4 percent and in 1982, to 70.9 percent. During the period of October, November and December 1982, and January 1983, MMI handled 77.8 percent of the producer milk made into butter, nonfat dry milk and cheese. In the Eastern Ohio-Western Pennsylvania market in 1980, MMI handled 50.7 percent of the milk

that was utilized to produce butter, nonfat dry milk and cheese. In 1981 this increased to 55.4 percent and in 1982 to 64.7 percent. During the period of October, November and December 1982, and January 1983, MMI handled 71 percent of the milk used to make butter, nonfat dry milk and cheese.

The MMI witness stated that, historically handlers in the two markets have been able to dispose of milk not needed by pool distributing plants to manufacturing plants and fulfill their obligation to the pool at the Class III price with minimal loss. However, last year this situation started to change. He testified that under the Eastern Ohio-Western Pennsylvania order (Order 36) during April, May, June and July 1982, MMI diverted 257 million pounds of milk to manufacturing plants, which was 29 percent above the same period in 1981. He indicated that since the prices offered by nonpool manufacturing plants were substantially below the Class III price and because MMI incurred additional hauling costs to get milk to manufacturing plants. MMI's cost of marketing member milk pooled under Order 36 and used to manufacture butter, nonfat dry milk and cheese was over \$1 million, or 39.7 cents per hundred-weight during April, May, June and July 1982. In the Ohio Valley market during April, May, June and July of 1982, MMI diverted 261 million pounds of milk to manufacturing plants at a loss of \$138,285, or 5.3 cents per hundred-weight. The cooperative indicated that its losses on marketing surplus milk in 1982 were covered by over-order prices on Class I milk.

However, the cooperative spokesman stated that its surplus disposal problem had gotten much worse during the past several months. He entered an exhibit showing that milk used to manufacture butter, nonfat dry milk and cheese in both markets as a whole during the 3-month period of November 1982 through January 1983 had increased an average of 29,000,000 pounds per month, or 23.6 percent as compared to the same period a year ago. The exhibit indicated that for the same period MMI, on the other hand, marketed 41,000,000 more pounds per month, or an increase of 57.4 percent, to manufacturing plants. The witness stated that last year all the pool manufacturing plants were operating at nearly 100 percent of capacity and one pool manufacturing plant with a capacity of

10,000,000 pounds per month closed shortly after the 1982 spring flush. He concluded that this means that the additional surplus milk this year must be marketed through nonpool plants located both within and outside the marketing areas of these two orders.

The cooperative, during its planning process for handling the surplus this spring, contacted four major cheese plants to ascertain the quantity of milk they would receive and the price they would pay during the months of April, May, June and July 1983. The witness stated that the replies indicated that they could accept quantities somewhat in excess of what they received last year from MMI. However, they said the prices they would be paying would be less than a year ago. The cooperative's best estimate from these replies is that the prices they will pay during this 4-month period will average about \$11.45 per hundredweight, which is \$1.17 below the January Class III price. MMI's witness stated that its only alternative to accepting such reduced prices is to sell the milk to manufacturing plants in the upper Midwest and incur a transportation cost of as much as \$2.00 per hundredweight. On the basis of cost experienced last year and the cost of marketing additional milk this year, MMI projected that its cost to send milk to manufacturing plants during April, May, June and July of 1983 will approximate \$3.7 million or 52.7 cents per hundredweight of member milk pooled in Orders 33 and 36 and used to manufacture butter, nonfat dry milk and cheese.

In these circumstances the cooperative maintains that it will be impossible for it to fulfill its obligation to the pools at the class III price without paying its members a price substantially below the blend price, unless relief is provided by amendment to the orders.

Reiter Dairy, a proprietary handler under both of the orders with pool distributing plants in Barberton, Ohio, and Springfield, Ohio, supported MMI's proposals. The witness for this handler stated that about 75 percent of its milk supply is obtained from independent producers and during the flush season of 1982 it incurred a loss of about 40 cents per hundredweight on the disposal of surplus milk due to the prices received for such milk.

Superior Dairy, Inc., a handler operating pool distributing plant under Order 36 at Canton, Ohio, supported MMI's request for relief in the disposition of surplus milk in the months of April, May, June and July 1983. The witness for Superior Dairy stated that during those months of 1981 and 1982 it was forced to dispose of surplus milk to cheese and butter plants at substantially less than the Class III order price. He stated that, at times, the price received for surplus milk was \$1.50 below the Class III price. Superior Dairy maintains this surplus milk supply in the flush production months, he said, in order to have an ample supply during the remaining eight months of the year, since most of its milk supply is from independent producers.

A handler who operates a pool supply plant under Order 38, Defiance Milk Products Company, urged that, if it is necessary to adopt MMI's proposals, the price reduction should apply to all Class III products. This handler manufactures evaporated and condensed milk and its witness pointed out that these products are interchangeable for many uses with nonfat dry milk. He contended, therefore, that all Class III products should continue to be priced on the same basis. In its post-hearing brief the company modified its position by requesting that only evaporated and condensed milk be added to the product uses to be considered for a price reduction.

Tri-County Producers' Cooperative, whose 38 members ship their milk to Superior Dairy, a pool distributing plant under Order 36, opposed MMI's proposals on the basis that the proposals would result in a reduction in the uniform price paid to producers by regulated handlers. Tri-County's witness further stated that all of Tri-County's milk is taken and paid for by Superior Dairy of Canton, Ohio, and there has been no objection by Superior to taking all the milk that Tri-County Producers' Cooperative can produce and there has been no problem selling all their milk.

Dairylea Cooperative, Inc., a cooperative of approximately 3,000 members, of whom 185 are producers under the Eastern Ohio-Western Pennsylvania order, opposed MMI's proposals to reduce the price by 40 cents per hundred-weight on milk used to produce butter, nonfat dry milk and cheese. The Dairylea witness contended that the pro-

posals, if adopted, would cause a severe misalignment of prices among Federal order markets and between order and non-order manufacturing operations. Handlers buying Order 36 milk for manufacturing use sell those manufactured products in competition with handlers regulated under markets in which Dairylea members sell milk. Consequently, he stated the proposals would put non-order and other order manufacturers at a competitive disadvantage in selling on the national market for butter, nonfat dry milk and cheese.

The National Farmers Organization (NFO), who has some members that are producers under Orders 33 and 36 and who operates a pool supply plant under Order 33, opposed the proposals to reduce the minimum order prices by 40 cents for certain manufactured dairy products for four months. NFO's witness stated that the proposals are a drastic departure from the long established policy of uniform classification among the various Federal orders. He pointed out that the market for butter, nonfat dry milk and cheese is a national market and questioned why manufacturers of these products in the Midwest and Northeast areas of the United States should have to pay the producers more for milk being used to produce these products than manufacturers using Order 33 or Order 36 milk. NFO maintained that it has not experienced the problems of being forced to sell milk at less than the Class III price like MMI has and does not anticipate they will have the problems that MMI has stated in their testimony. Thus, NFO claims it would be inequitable to NFO producers to lower the blend price to all producers by the adoption of MMI's proposals.

Several persons representing organization outside the Order 33 and Order 36 areas testified in opposition to the proposals to reduce the order prices 40 cents on milk used to make butter, nonfat dry milk and cheese. These organizations include: Farmers Union Milk Marketing Cooperative, Madison, Wisconsin; Land O'Lakes, Inc., Arden Hills, Minnesota; Wisconsin Federation of Cooperatives, Madison, Wisconsin; Trade Association of Proprietary Plants, Baraboo, Wisconsin; Wisconsin Cheese Makers Association, Madison, Wisconsin; and Beatrice Foods Company, Chicago, Illinois (on behalf of its cheese plants). In summary, the opposition testimony of these organizations covered the fol-

lowing points: (1) Adoption of the proposals would disrupt the national market for manufactured dairy products; (2) problems of managing reserve milk supplies are universal in the dairy industry; (3) processing margins have been adequate to justify the addition of new capacity to handle the extra milk; (4) selling milk at a loss during part of the year is likely a profitable strategy for MMI; and (5) the costs of supply balancing services should be recovered as a service charge to Class I milk handlers.

As indicated earlier, current marketing conditions in the Ohio Valley and Eastern Ohio-Western Pennsylvania markets warrant temporary amendment action to provide more equitable sharing among all producers on the markets of the cost of disposing of surplus milk. The surplus milk is processed into storable manufactured dairy products, primarily butter, nonfat dry milk, and cheese. The amount of milk being processed into these products is up by substantial amounts in each market. Under Order 33, 54.8 million more pounds of milk were processed into these products during November and December 1982 and January 1983 than during the same 3-month period a year ago, up from 158 million to 212.8 million pounds, or an increase of 34.7 percent. Under Order 36, 31.2 million more pounds of milk were processed into those products during November and December 1982 and January 1983 than during the same 3-month period a year ago, up from 206 million pounds to 237.2 million pounds, or an increase of 15.1 percent.

The evidence supports MMI's claims that it is not only the major balancer of milk supplies in the two markets but that indirectly it is balancing the surplus of non-member producers. In the Ohio Valley market, milk handled by MMI and processed into butter, nonfat dry milk and cheese amounted to 167.2 million pounds during the 3-month period of November 1982-January 1983, compared to 94.3 million pounds for the same 3 months a year ago, or up 72.9 million pounds. This represents an increase of 77.3 percent. All other handlers in the market handled a combined total of 45.6 million pounds of milk that was processed into butter, nonfat dry milk and cheese during November 1982-January 1983. This was 18.1 million pounds less than for the same 3-month period a year ago, or down 28.4 percent.

Similarly, under Order 36, MMI handled 168.6 million pounds of milk used to produce butter, nonfat dry milk and cheese during November 1982-January 1983, compared to 119 million pounds during the same 3-month period a year ago. This represents an increase of 41.7 percent. All other handlers under Order 36 handled a combined total of 68.5 million pounds of milk processed into butter, nonfat dry milk and cheese during November 1982-January 1983, compared to a total of 86.9 million pounds during the same 3-month period a year ago. This amounted to a decrease of 18.4 million pounds, or 21.2 percent less. Thus, on the basis of recent market history, it is clear that MMI currently handles a disproportionate share of the increased amounts of surplus milk on the Ohio Valley and Eastern Ohio-Western Pennsylvania markets.

The record demonstrates that MMI is currently handling a disproportionate share of the total surplus milk supplies on the two markets, also. In January 1983, MMI handled 70.1 percent of the milk used in making butter, nonfat dry milk and cheese under Order 36, but it handled only 50 percent of the total milk supply on the market. In the Ohio Valley market, MMI handled 81.7 percent of the milk used to produce butter, nonfat dry milk and cheese, but handled 75.9 percent of the total milk supply on the market.

The plants that have manufactured the majority of surplus milk on these two markets are relatively few in number. Surplus milk under Order 36 is processed primarily at the following plants: A regulated butter and nonfat dry milk plant of MMI's at Orrville, Ohio; nonpool butter and nonfat dry milk plants at Somerset, Pennsylvania; Collins Center, New York; and Batavia, New York; and nonpool cheese plants at Brewster, Ohio; Middlefield, Ohio; New Wilmington, Pennsylvania; Cleveland, Ohio; and Fremont, Ohio. Surplus milk under Order 33 is processed primarily at the following plants: Two regulated butter and nonfat dry milk plants of MMI's at Dayton, Ohio; and Goshen, Indiana; a regulated butter and nonfat dry milk plant at New Bremen, Ohio; and three nonpool cheese plants at Upper Sandusky, Ohio; Wapakonita, Ohio; and Salem, Indiana.

The outlets for surplus milk under the orders are much fewer in number and more widely dispersed geographically than are the distributing plants that take about two-thirds of the producer milk supply. In the Eastern Ohio-Western Pennsylvania market, there are 39 pool distributing plants compared to the 9 manufacturing plants scattered over a 3-state area that serve as outlets for surplus milk. In the Ohio Valley market, there are 28 pool distributing plants compared to the 5 manufacturing plants in a two-state area that serve as outlets for surplus milk. In these circumstances, it is typical for farm-to-plant hauling costs to be greater on milk moved to manufacturing plants than on milk moved to distributing plants.

In these markets, it is a practice for handlers to deduct from payments to producers the cost of hauling milk from the farm to the plant of normal receipt, which for the most part is a pool distributing plant. When part of a handler's milk supply is diverted to a manufacturing plant, the hauler typically charges an extra amount when the farm-to-plant distance is significantly greater. It is not unusual, though, for the handler to absorb such extra hauling costs. Also, if a handler first receives the surplus milk at his distributing plant and then transfers it to a manufacturing plant, he incurs the cost of transferring the milk.

Handler witnesses stated that they incur hauling costs in disposing of surplus milk. In the case of MMI, the additional hauling costs incurred by the cooperative in moving milk to manufacturing outlets amounted to \$545,745 in the Order 36 market and \$89,087 in the Order 33 market during the period of April-July 1982. MMI projected that its additional cost of hauling milk for use in butter, nonfat dry milk and cheese during April through July 1983 will be \$2,152,000 in the two markets. This is an average of 30.6 cents per hundredweight of the projected 703,800,000 pounds of milk that the cooperative expects to market to butter, nonfat dry milk and cheese plants.

MMI's projected 30.6 cents per hundredweight loss on hauling surplus milk is a cost far above the amount of farm-to-plant hauling that manufacturing grade milk plants in Minnesota and Wisconsin could reasonably be expected to incur, and whose pay prices serve as the basic formula price for Class III milk under the orders. More-

over, handlers in the Order 33 and Order 36 markets who are not balancing the seasonal surplus supplies would not incur such cost, which places MMI at a competitive disadvantage in these markets.

The other type of loss that MMI listed in its projected cost of marketing surplus milk is the difference between the prices received for milk it sells to nonpool plants and the Class III price at which it must account to the pool. During the period April-July 1982, MMI incurred a net loss of \$471,688 in the Order 36 market and a net loss of \$49,198 in the Order 33 market due to the differences between prices received and MMI's obligation to the pool on milk used to manufacture butter, nonfat dry milk and cheese. Its projected loss due to prices received is \$1,560,000 for the two markets over the period April-July 1983. This would amount to an average of 22.1 cents per hundredweight of the 703,800,000 pounds of milk that MMI expects to move to butter, nonfat dry milk and cheese outlets during the 4-month period.

MMI's projected loss of 22.1 cents per hundredweight due to below-order prices received and 30.6 cent per hundredweight for extra hauling costs, or a total of 52.7 cents per hundredweight on all the milk it expects to move to butter, nonfat dry milk and cheese outlets, would be an inequitable burden on the cooperative since it would not be able to pay a competitive price to its members. Moreover, proprietary handlers who balance their own supplies would have to bear the losses that they expect to incur, since they would have to pay their producers the uniform prices computed under the orders.

Unless relief is provided under the orders to alleviate the financial burden handlers are faced within handling the recent surge in the volume of surplus milk on the markets, substantial inequities among handlers and among producers will clearly exist. Handlers who are performing the balancing services in the markets will undoubtedly incur costs that other handlers will not, thus detracting from the intent of the uniform class prices to handlers under the order. Cooperatives who are performing the balancing services in the market will undoubtedly incur costs that other cooperatives will not, thus detracting from the intent of the uniform prices to producers.

Since the record indicates that the burden of handling surplus milk in these markets is not uniformly distributed among all handlers, it would be appropriate to provide price relief under the orders to cover the actual losses incurred. Also, the price reduction should be on marketings of milk in only those uses that proponent stated are the normal outlets for seasonal surplus milk on these markets, namely butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) plants. As proposed by MMI, the order changes should apply only through July 1983.

Opposition testimony to making any changes in the orders came primarily from organizations that were concerned about the possible disruption of finished product markets. Limiting the relief to only the amount of the extraordinary losses incurred relative to the Class III price should minimize this concern since the net cost to handlers for surplus milk would be the Class III price, which is the same under all Federal orders for milk used to produce butter, nonfat dry milk and storable cheese. Moreover, the prices of these finished products are essentially floored in effect at the levels established under the dairy price support program. Also, the price reduction applies only to storable manufactured products, for which processors are not under pressure to market because the product may spoil. It does not apply to some storable products such as canned milk and blends of margarine and butter, for which there was no demonstration on the record that handlers incur losses in marketing milk for such uses. Nor does the price reduction apply to transfers of cream, for which ice cream processors may be competing with butter makers.

A further argument by opponents is that the cost of supply balancing services should be recovered as a service charge to Class I milk handlers. To some degree, the costs of balancing the markets' supplies with demand are now being assessed to distributing plant operations by means of an over-order charge by MMI on milk sold to the distributors. The witness for MMI stated that the current over-order charge would not reduce its projected loss of 52.7 cents per hundredweight below the 40-cent per hundredweight price reduction it proposed. Thus, the rate adopted

herein covers only the costs the cooperative expects will not be covered by over-order charges.

With respect to opponents' argument that the problems of managing reserve milk supplies are universal in the dairy industry, the degree of the problem for MMI is greatly different this season. The volume of surplus milk being handled by MMI is up 77 percent in the Ohio Valley market and 42 percent in the Eastern Ohio-Western Pennsylvania market. This is an unusual surge in the volume of surplus milk for any cooperative to handle.

A further point advanced by opponents was that selling milk [at] a loss during part of the year is likely a profitable strategy for MMI relative to building plant capacity to handle the milk. This could well be the case; however, it is more equitable for such losses to be shared uniformly by all producers in the markets. The losses can be expected to amount to about 15 cents per hundredweight of all producer milk.

2. Omission of a recommended decision and the opportunity to file exceptions thereto. The omission of a recommended decision was requested by MMI. Proponent cooperative indicated that its cost of balancing the surplus milk supplies on the markets will increase sharply beginning in April 1983. For this reason, the cooperative requested that the Department adopt its proposals on an emergency basis to insure that all producers share as soon as possible in the high cost of marketing surplus milk supplies on the markets.

Opponents of the proposals contended that proponent should have known earlier that surplus milk supplies were increasing and made its request for a hearing in time to allow the normal procedure of issuing a recommended decision.

The evidence in the record of this proceeding strongly indicates that surplus milk supplies in the two markets will be substantially larger than usual during April, May, June and July of this year. The amendments adopts herein are in response to these marketing conditions and are for the purpose of accommodating the handling of surplus milk under unusual circumstances. Unless amendatory action is taken on an emergency basis, the opportunity to

assure producer and handler equity in these markets will be lost. The normal procedure of issuing a recommended decision and providing time to file exceptions thereto will not permit the implementation of the amendments in time for them to serve their intended purpose.

It is therefore found that due and timely execution of the Secretary's function in this proceeding imperatively and unavoidably requires omission of the recommended decision and the opportunity for filing exceptions thereto.

15. The Order amendment adopted by the Secretary to accomplish MMI's proposal varies in form, but not substance, from MMI's proposal. That is, instead of expressly creating a new Class III(A) priced 40¢ less than Class III, the Secretary amended the Order to provide that in computing the net pool obligation of each handler from the date of the amendatory action (June 3, 1983) through July 1983, an amount should be subtracted equal to the pounds of producer milk used to make butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) multiplied by 40¢ per hundredweight. The temporary amendment added the following new subsection (48 Fed. Reg. 22,313, 22,318 (1983)):

§ 1033.60 *Computation of the net pool obligation of each handler.*

* * * * *

(h) With respect to milk marketed on and after the effective date of this amendatory action [June 3, 1983] through July 1983, subtract an amount determined by multiplying the pounds of producer milk used to make butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) by 40 cents per hundredweight.

The Secretary's decision does not explain why he adopted this method of accomplishing MMI's objective rather than expressly creating a new Class III(A) priced 40¢ below Class III, as proposed. (As stated in § I of the conclusions, I infer that he did so to avoid extensive reprogramming of the computer and amending 11 sections of the Order, for a temporary, 2-month price reduction.)

16. Following a producer referendum required by the Act, a final rule identical to the rule referred to in Finding 15, *supra*, was published on June 3, 1983, effective from June 3 through July 31, 1983 (48 Fed. Reg. 24,862, 24,863 (1983)).

17. During the effective period of the temporary, 2-month amendment, all pool handlers of milk used to make butter, nonfat dry

milk and cheese (except cottage cheese and cottage cheese curd) drew from the producer-settlement fund the difference between the blend price paid to producers and the temporarily reduced price, while all pool handlers of milk used to make evaporated milk (and other Class III products not included in the temporary price reduction) drew from the producer-settlement fund a lesser amount, i.e., the difference between the blend price and the Class III price previously established by rulemaking, which was unaffected by the temporary amendment.⁷

18. From June 3, 1983, through July 31, 1983, petitioner used a total of 17,002,859 pounds of producer milk in the production of evaporated whole milk. If the temporary, 2-month price reduction had been applicable to such milk, the amount petitioner would have received from the producer-settlement fund would have been increased by \$68,011.44.

CONCLUSIONS

This is a proceeding instituted by petitioner under § 8c(15)(A) of the Act challenging the validity of a temporary, 2-month amendment to Order No. 33. It is well-settled that the burden of proof in such a proceeding rests with petitioner. Petitioner has the burden of proving that the challenged Order amendment is "not in accordance with law" (7 U.S.C. § 608c(15)(A). *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied*, 374 U.S. 832, 375 U.S. 819 (1963); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo. 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickward*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860, 862-63 (3d Cir. 1945).

Also, as stated in *In re Michaels Dairies, Inc.*, 34 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319, *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. Dec. 17, 1976);

⁷ The financial effect on a handler of having milk classified as Class III rather than Class III(A) would be the same irrespective of whether the Market Administrator or the handler was making the blend price payments to the producers (see note 3, *supra*). This finding is written on the basis of the handler paying the blend price to the producers.

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. See *In re Independent Milk Producer-Distributors' Assoc.*, 20 Agriculture Decisions 1, 18 (1961); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 Agriculture Decisions 1209, 1220 (1957), affirmed, Southern Dist. Miss., January 5, 1959. See, also, *Pacific States Co v. White*, 296 U.S. 176, 182.

Petitioner no longer challenges (even as an alternative argument) the legality of the temporary, 2-month price reduction for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd). Petitioner now contends only that the Secretary unlawfully failed to include evaporated milk in the reduction.

Petitioner's petition states: "In the alternative, Petitioner requests that the Secretary hold unlawful and set aside the amendments to Order 33 establishing the \$.40 credit in § 1033.60(H)" (Petition at 5). However, in its subsequent briefs, petitioner argues emphatically that the temporary reduction is authorized for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd). For example, petitioner's original brief before the ALJ states (Brief at 7, 18):

There was substantial record evidence that a reduction in the price of milk to be used in surplus, storable, manufactured products was desirable in order to most efficiently and equitably clear the market during the flush period of 1983. Therefore, the proposal to establish a lower Class III price was properly adopted. . . .

* * * * *

The Secretary's contention that if the Rule is illegal, all credits should be set aside is illogical. The rulemaking record certainly supported the decision to reduce the Class III price level to facilitate market clearing in the face of an extreme surplus. Consequently, to renounce the entire Rule would throw out the baby with the bath water, rejecting what is supported by the record.

Similarly, petitioner's brief in opposition to respondent's appeal states (Brief at 25):

To wipe out the reduced price to all other handlers, the only alternative remedy, would rescind a portion of the rule—the price reduction—which has not been challenged

and which Judge Palmer found *was* supported by substantial record evidence. This "remedy" would injure other handlers not parties to this proceeding who have not had an opportunity to be heard. For instance, MMI, the proponent, would suffer a charge of close to one-half million dollars on its next pool bill if the entire rule was wiped out.

Although the validity of the temporary price reduction for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) is not now challenged, it is essential for a proper resolution of the evaporated milk issue to show first in § I below the legal basis for the temporary price reduction for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), and then to show in § II that the Secretary's determination not to include evaporated milk in the new Class III(A) was in accordance with law. Even if it were to be determined that the Secretary's action leaving evaporated milk in Class III was not in accordance with law, it is shown in § III that the proper remedy would be to remand the proceeding to the Secretary for further rulemaking action. Finally, it is shown in § IV that interest would not be appropriate, even if petitioner were to be awarded a monetary recovery.

I. The Temporary, 2-Month Amendment Created, in Effect, a New Class III(A),
Which Does Not Violate Handler Uniformity.

The Act provides for classifying milk in accordance with the form in which or the purpose for which it is used, and fixing uniform, minimum prices for each such use classification which all pool handlers shall pay for milk purchased from producers and co-operatives. The Act provides (7 U.S.C. § 608c(5), (7)(D)):

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such

order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

* * * * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year, and (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * * *

(7) *Terms common to all orders*

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

The notice of proposed rulemaking involved here was couched in terms of a temporary, emergency amendment to create a new Class III(A), consisting of butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) (Finding 4). The temporary, new Class III(A) was to be priced 40¢ below the existing Class III, then applicable to milk used to make 18 different products (Findings 4-7).

Substantial evidence at the rulemaking hearing supports the temporary, new Class III(A) proposal. The rulemaking evidence establishes that a single cooperative association of producers, MMI, produced 77% of all the milk marketed under the Order, that it handled a disproportionate share of the surplus in the Order, that 87% of the Class III surplus milk under the Order was used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) from April-July, 1982 (Finding 8 n.6), that the market was faced with a substantially greater spring surge in 1983 than in prior years, that the pool manufacturing plants were all operating at full capacity, and that milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) during that emergency period would be temporarily reduced in value because of anticipated additional hauling costs and reduced prices to be paid by nonpool plants for milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) (Findings 8, 9).

The Secretary agreed with MMI's evidence and position at the rulemaking hearing, but instead of expressly creating a new Class III(A), as proposed, the Secretary took other action that had the identical effect, *i.e.*, he amended 7 CFR § 1033.60 (1983), "Computation of the net pool obligation of each handler," to provide for subtracting from each handler's net pool obligation an amount equal to the milk it used for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) multiplied by 40¢ per hundredweight (Findings 14-16).

There is no explanation in the Secretary's decision for the *form* of his action. But it was undoubtedly dictated by administrative convenience. We know from the § 8c(15)(A) hearing record, as distinguished from the rulemaking hearing record, that if the proposed amendment had been adopted exactly as offered, expressly creating a new Class III(A), it would have involved extensive reprogramming of the pool computer, for a temporary, 2-month amend-

ment. However, since as shown in § II, below, the validity of the Secretary's rulemaking action must be judged solely by the rule-making record, I infer from the complexities of the pool calculations necessary under the Orders, and the widespread use of computers in the Department of Agriculture's programs, of which I am personally aware, that the Order No. 33 calculations are computerized, and that the Secretary did not expressly create a new Class III(A) to avoid the severe burden that would have been caused by the need to reprogram the computer.

I infer, also, that since speed of action was required in this emergency situation, the Secretary was interested in avoiding unnecessary rewriting of Order provisions for a temporary, 2-month amendment. If the Secretary had expressly created a new Class III(A), as proposed, 11 sections of the Order, where classes of manufactured products are named, would have had to be rewritten to refer to Class III(A), *viz.*, 7 CFR § 1033.12, .14, .15, .27, .41, .43, .46, .51, .56, .57, .60.

If there were any doubt as to the correctness of the inference that the form of the Secretary's action was dictated solely by administrative convenience, or if the matter were challenged by petitioner, I would remand the proceeding to the Secretary for the purpose of expanding his findings to explain the form of his action (see § III, below). But there is no doubt as to the matter, and the Secretary's action was accepted by petitioner, respondent and the ALJ as a price classification action. As stated by the ALJ (Initial Decision at 23-24):

At any rate, respondent has not attempted to justify the Secretary's action in terms of the credit being a lawful differential.

Instead, respondent would justify the amendatory action as price classification couched in other terms for the sake of administrative convenience. Both petitioner and respondent premise their positions on this construction of the Secretary's action.

Each stresses evidence in the record which supports a reduction of the Order 33 price for the lowest use classification. Their shared premise finds support in testimony by the representatives of both MMI and Defiance Milk Products Company that surplus milk could be purchased at less than the Order 33 Class III price and, even though there was contrary evidence indicating that a 40 cent reduction in the Class III price would reduce it below the prevalent price for surplus milk, it was within the Secretary's power to reduce the minimum price for the lowest use classification on the

basis of such record evidence. It therefore must be concluded that the consequent price reduction was supported by substantial evidence. But once the Secretary decided to establish a lower minimum price on the basis of such evidence, he was not free to remove evaporated whole milk from that price classification without a sound, stated economic justification, cognizable under the Act, that accords with the evidence of record.⁸

Accordingly, the validity of the Secretary's action should be determined by considering the Secretary's action as classifying milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in a separate class (for convenience, referred to as Class III(A)) priced 40¢ below the Class III price.

As a final word in support of this position, § 8c(5)(A) does not limit the Secretary in how to write an order provision classifying milk and pricing it uniformly. In the present case, involving an extremely short period in which an emergency amendment was to be effective, nothing in § 8c(5)(A) prevented the Secretary from classifying milk used to produce butter, nonfat dry milk and cheese (not including cottage cheese and cottage cheese curd) separately, utilizing the *form* of a temporary subtraction from handlers' net pool obligations.⁹

⁸ As shown in § II, below, the ALJ's concluding sentence misconceives what the Secretary did. The Secretary did not *remove* evaporated milk from the temporary, new Class III(A). He *failed to include* evaporated milk in the temporary, new Class III(A). Hence the issues as to evaporated milk are whether substantial evidence at the rulemaking hearing supports *including* evaporated milk in the temporary, new Class III(A), and if so, was it arbitrary, capricious or an abuse of discretion to fail to include evaporated milk in the temporary, new Class III(A).

⁹ Since the Secretary's temporary action here was, in effect, merely a classification of milk according to its use value, based on the temporarily reduced value of milk used for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), it was not, as suggested by the ALJ, "a special differential of the very sort that was rejected in *Brannan v. Stark*, *supra*" (Initial Decision at 25). *Brannan v. Stark*, 342 U.S. 451 (1952), which I helped brief, involved special payments made only to cooperatives. The temporary, new Class III(A) price, on the other hand, applied uniformly to all handlers, whether cooperative or proprietary (non-cooperative). (In *Grant v. Benson*, 229 F.2d 765, 766-72 (D.C. Cir.), *cert. denied*, 350 U.S. 1015 (1956), which I also helped brief, special payments made only to cooperatives were upheld under § 8c(7)(D) of the Act.) If further statutory support for the Secretary's action here were required, other than the classification authority in § 8c(5)(A), reliance could be placed on the incidental and necessary provisions of 7 U.S.C. § 608c(7)(D), quoted above in this section. In *Smyser v. Block*, 580 F. Supp. 1397, 1398-1404 (M.D. Pa. 1984), *appeal docketed*, No. 84-5297 (3d Cir. Apr. 30, 1984), the court held that a temporary transportation credit paid to handlers under Order No. 60, to alleviate the same type of emergency surplus problem as is involved here, was authorized by § 8c(7)(D) of the Act, was not an impermissible handler differential, and was consistent with the requirements of uniformity as to handlers in § 8c(5).

Although substantial evidence at the rulemaking hearing supports the Secretary's temporary, 2-month classification action, insofar as it relates to butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) (Findings 8, 9), it should be recognized that there was strong evidence to the contrary, as to these products. As the Secretary recognizes in his decision, a cooperative witness testified that the proposed Class III(A) "would cause a severe misalignment of prices among Federal order markets and between order and non-order manufacturing operations" and "put non-order and other order manufacturers at a competitive disadvantage in selling on the national market for butter, nonfat dry milk and cheese" (48 Fed. Reg. 22,313, 22,314 (1983)).

Another cooperative witness testified that the "proposals are a drastic departure from the long established policy of uniform classification among the various Federal orders" (*id.* at 22,315). The witness—

pointed out that the market for butter, nonfat dry milk and cheese is a national market and questioned why manufacturers of these products in the Midwest and Northeast areas of the United States should have to pay the producers more for milk being used to produce these products than manufacturers using Order 33 or Order 36 milk (*id.*).

The evidence and arguments in opposition to the proposed Class III(A) price reduction undoubtedly would have been given greater weight by the Secretary if the proposed amendment were not to be in effect for only a very short period. The objections raised were quite serious. The Class III(A) proposal did not provide perfect equity on either a local or a national basis.

For example, it was quite possible that a particular handler under Order No. 33 might get the benefit of the price reduction, by using milk for butter, nonfat dry milk or cheese (except cottage cheese and cottage cheese curd), without incurring any extra cost incident to hauling milk to another plant or selling it to a nonpool handler. The price reduction would be a pure windfall to such a handler, resulting in the problems referred to by opponents of the proposal.

However, since substantial evidence demonstrated that milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) would temporarily have reduced value (because of expected hauling costs and lower prices to be received from nonpool plants) to MMI, whose members produced 77% of all the milk marketed under the Order, and to other handlers

similarly situated, the Secretary resolved the matter of the proposal. His action was in accordance with law.

It has been recognized that absolute equality and complete equity is not required in Federal Milk Marketing Orders. As stated in *United States v. Mills*, 315 F.2d 828, 838 (4th Cir.), *cert. denied*, 374 U.S. 832, 375 U.S. 819 (1963):

After all, the Secretary must look at the area with a wide and comprehensive perspective. He has before him the entire output of milk in the area, and he must search for the best ways and means for its disposition. Aware of the annual consumption and distribution of fluid milk, he must arrange to channel the residue into outlets the most advantageous to the producer and consumer. He fashions his order accordingly. Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. *United States v. Rock Royal Co-op.*, *supra*, 307 U.S. 533, 568-581, 59 S.Ct. 993, 83 L.Ed. 1446. Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot "produce complete equality, for the variables are too numerous", "he fulfills his role when he makes a reasoned" Order. *Mitchell v. Budd*, 350 U.S. 473, 480, 76 S.Ct. 527, 531-532, 100 L.Ed. 565 (1956).¹⁰

A fortiori, absolute equality and complete equity are not required when the Secretary promulgates a temporary, 2-month amendment to solve an emergency situation.

In addition, it has been recognized that reviewing authorities should give particular weight to administrative expertise in the field of milk marketing, in view of the complexities of the "milk problem." As stated in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966):

A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of

¹⁰ *Accord Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 319-20 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); and see *Dairymen's League Coop. Ass'n v. Brannan*, 173 F.2d 57, 66 (2d Cir.), *cert. denied*, 338 U.S. 825 (1949).

judicial comprehension more than lack of executive authority.¹¹

II. Substantial Evidence Does Not Support Inclusion of Evaporated Milk in Class III(A), But Even if it Did, the Secretary's Failure to Include Evaporated Milk Was Not Arbitrary, Capricious or an Abuse of Discretion.

Federal Milk Orders and amendments to Orders are required to be based on evidence adduced at a formal rulemaking hearing. The Act provides (7 U.S.C. § 608c(3), (4), (17)):

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * * * *

(17) Provisions applicable to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof. . . .

Prior to the temporary, amendatory action involved here, evaporated milk and 17 other products, including butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), were in

¹¹ See, also *Queensboro Farms Prods., Inc. v. Wickard*, 137 F.2d 969, 980 (2d Cir 1943).

Class III, priced at the basic formula(Minnesota-Wisconsin) manufacturing price for the month (Findings 6, 7). No challenge is made by petitioner of the inclusion, prior to the temporary, amendatory action involved here, of evaporated milk in Class III, or of the price applicable to Class III. Hence it is conclusively presumed, for the purposes of this proceeding, that prior to the temporary, amendatory action involved here, substantial evidence supported the existing classification and pricing provisions applicable to evaporated milk. See *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 567-68 (1939); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935); *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934).

As shown in § I, *supra*, substantial evidence at the emergency rulemaking hearing supported the creation of a temporary, new Class III(A) for milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), and temporary pricing of such milk 40¢ below the Class III price. For the Secretary to have included evaporated milk (or any of the other 14 products remaining in Class III) in the new Class III(A), substantial evidence would have had to support the *inclusion* of evaporated milk in the new Class III(A).

The ALJ erroneously searched the record to determine whether substantial evidence supported the reclassification of milk used to produce evaporated milk into a higher classification (Initial Decision at 24-28). But the Secretary did not reclassify milk used to produce evaporated milk into a higher classification. He left it where it was (in Class III), and where it belonged, until proven otherwise.

Petitioner erroneously relies on dicta in *In re Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431, 442 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252 (D.C. Cir. 1980), for support for its views that substantial evidence must support the *exclusion* of evaporated milk from the new Class III(A) (whereas the proper test is whether substantial evidence supports the *inclusion* of evaporated milk in the new Class III(A)). But the dicta in *Babcock* is not in point.

Babcock involved a situation where the Secretary amended a number of orders that previously had only two classes, Class I and Class II, and divided the surplus classification into a new Class II and a new Class III. Prior to the amendatory action, handlers were given past notice of the actual level of the surplus price (then Class II), *i.e.*, they did not know the price until after they manufactured the milk. One proposal at the rulemaking hearing was to give advance notice for the new Class II products. The Secretary rejected

that proposal and continued to give past notice of the exact level of the new Class II and the new Class III prices.

In *Babcock*, after holding that the Secretary's decision to continue to give handlers past notice as to the level of the new Class II prices was not supported by adequate findings (35 Agric. Dec. at 436-41), the Judicial Officer indicated (in dicta) that the Secretary's new rulemaking findings as to past notice for the new Class II price would have to be supported by substantial evidence. The Judicial Officer stated (35 Agric. Dec. at 442):

The evidence in the rulemaking records is particularly important since I disagree with respondent's contention that evidence in the rulemaking records is not required to support the Assistant Secretary's determination to continue to give past notice of the Class II price. Respondent relies on *In re Abbotts Dairies*, 32 Agriculture Decisions 318, 378-388 (1973), appeal pending [*rev'd*, 389 F. Supp. 1 (E.D. Pa. 1975), *reconsideration denied*, 421 F. Supp. 415 (E.D. Pa. 1976), *aff'd mem.*, 559 F.2d 1207 (3d Cir. 1977), *remanded*, 438 F. Supp. 629 (E.D. Pa. 1977), *rev'd and remanded*, 584 F.2d 12 (3d Cir. 1978)], which holds that a decision to refuse to adopt a proposed amendment—as distinguished from promulgating an amendment—need not be supported by substantial evidence. But that doctrine is not applicable here because the Assistant Secretary made significant changes in the products included in the present Class II. Class II was changed to such an extent that it would require a new determination, based on substantial evidence, to support past notice for the new Class II products.¹²

If the *Babcock* dicta were relevant at all here, it would suggest that since an amendment was promulgated creating a new Class III(A), substantial evidence would have to support the inclusion of each product in the new Class III(A).

The Secretary declined to adopt petitioner's proposal to temporarily reduce the price of milk used for evaporated milk (and other uses) because the record lacked substantial evidence of economic circumstances necessary to justify such regulatory action. "[T]here was no demonstration on the record that handlers incur losses in marketing milk for such uses." 48 Fed. Reg. 22,313, 22,316 (1983).

¹² The rationale and evidence supporting past notice applied to the products included in the new Class III. There was little or no support in the record or findings for past notice as to the new Class II products. (35 Agric. Dec. at 435-39).

Petitioner failed to prove that it expected the same type of losses for (and temporarily reduced value of) milk used to make evaporated milk, due to the 1983 surplus situation, as was shown by MMI as to milk to be used for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd). Without substantial evidence similar to that supporting the temporary price reduction promulgated, the Secretary could not, within the limits set by § 8c(4) and (17) of the Act, amend the Order to temporarily reduce the price of milk used to make evaporated milk.

In contrast to MMI's evidence showing temporarily reduced value of milk to be used for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) because of expected hauling costs and below-order price losses resulting from the unusual surplus situation, which prompted the temporary amendment, petitioner's testimony at the rulemaking hearing established a different type of financial disadvantage which was not attributable to the emergency surplus situation.

Petitioner testified that its financial disadvantage stemmed from its status as a plant buying Grade A milk competing with nonregulated plants using cheaper, Grade B milk (Tr. 172, 175). This competitive situation existed prior to the surplus emergency in the market and was not caused by the increase in surplus milk.

Furthermore, petitioner did not testify that it was committed in the spring of 1983 or even contemplating taking on more milk than it could use in its own plant. Specifically, petitioner did not testify that it expected to incur hauling costs or below-order price losses in selling surplus milk to other plants in the spring of 1983.

Not only was petitioner not faced with selling milk to other plants at a loss, but petitioner was not even committed to helping to clear the market by taking on more milk in the spring of 1983. Petitioner testified that it would not take on more milk at current prices and would merely consider taking it on if the price were reduced. Given the fact that petitioner's purchases of surplus milk had continued to decline in the spring of 1982 when non-Order 33 milk was available at substantially less than the Class III price (Tr. 9-70, 183), petitioner's testimony that it would consider buying more Order 33 milk in the 1983 flush season if it were entitled to a lower Order price was not persuasive.

In summary, the rulemaking record revealed three points which differentiated petitioner's situation from that faced by handlers ordered to sell the majority of the 1983 spring surplus milk to non-dol butter, nonfat dry milk and cheese plants:

1. Petitioner did not demonstrate that it would incur extra hauling costs and below-order sale price losses to get rid of extra surplus in the 1983 season;

2. Despite its alleged good intentions, petitioner was not committed to taking on any extra surplus in 1983; and

3. The financial disadvantage to which petitioner testified, resulting from competing with non-regulated plants, existed at all times and was not caused by the extra surplus situation.

the record does not indicate that petitioner would incur the same losses as the other proprietary and cooperative handlers buying their own supplies who would bear the brunt of disposing of excess surplus in 1983 for use in butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), it was reasonable for the Secretary to promulgate a temporary amendment which did not include evaporated milk (as well as other milk uses) in temporary price relief aimed at ameliorating those specific losses attributable to the particular problem of extra surplus disposal.

The ALJ ruled, however, that evaporated milk must be priced the same as butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) even during the temporary emergency because (slip op. at 25-28):

1. It was a primary outlet for seasonal surplus milk;

2. It had always been priced the same as those uses and should continue to be so because of the interchangeable uses of the products;

3. The proponent cooperative did not oppose petitioner's proposal if petitioner could "make a case for themselves"; and

4. If the price of milk for evaporation were reduced, petitioner could buy and process more milk and, thus, help clear the market.

to the first reason, there is no solid, factual basis in the record for the ALJ's finding that evaporation is a primary outlet for disposing surplus in the market. As to the others, they do not compel the Secretary to include evaporated milk in the reduced clearing the temporary, 2-month emergency period.

At the rulemaking hearing, MMI showed in its statistics and testimony that most surplus Class III milk in Order No. 33 goes in

butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) (Tr. 58-63; Ex. 8, table 5; Ex. 5, table 3). For example, in the spring of 1982, 87% of the Class III milk in Order No. 33 went into those products (Finding 8 n.6). There was also evidence that milk going into these uses had increased substantially (Tr. 60-61; Ex. 5, table 3; Ex. 8). For example, milk going into these uses under Order No. 33 from November 1982 through January 1983 increased 34.7% compared to the same 3 months a year before (Finding 8(d)). MMI testified that it would be forced to sell the surge in 1983 spring surplus for such uses at a loss and backed this up with estimates of the extra milk to be handled, the anticipated hauling costs and the estimated cut in price it would be forced to accept from nonpool plants (Tr. 64-69; Ex. 8, table 10).

MMI also testified that some of its own plants manufacture substantial quantities of products other than butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), and that it had a substantial part of the condensed milk business (Tr. 123, 150-51). Nonetheless, MMI testified that such milk uses were not included in the proposal because, comparatively, they were not primary outlets for the expected surplus supply (Tr. 162-63).

On the other hand, neither petitioner nor anyone else testified that evaporated milk was a primary outlet for surplus milk in Order No. 33. The ALJ based his finding that evaporated milk was a primary surplus outlet partially on testimony by MMI that evaporated and condensed milk are a "significant" outlet for *Grade B* surplus (Initial Decision at 25-26; citing Tr. 162-63).¹³ However, this testimony by MMI is irrelevant to the real issue of which uses presented the primary surplus outlets for *Grade A* milk, which is the only milk regulated under the Federal Milk Order system. *Grade B* milk is not priced or regulated in Order No. 33, and is not part of the statistical exhibits of surplus amounts and uses made a part of the rulemaking record. Petitioner's plant, at the time of the

¹³ Petitioner contends that the MMI witness meant to refer to *Grade A* milk, rather than to *Grade B* (Brief in Opposition to Respondent's Appeal at 19-20). And petitioner attaches an affidavit by the attorney for a handler at the hearing who asked the question stating that he believes the MMI witness understood the question to relate to *Grade A* milk, even though the transcript shows "*Grade B*." However, on the two pages immediately before the testimony in question, the questions and answers refer to "*Grade B*" milk 13 times (Tr. 160-61). This lends support to reading the testimony in question as it appears in the official transcript. But in any event, the rules of practice provide for the ALJ who conducts the rulemaking hearing to certify the rulemaking record (7 CFR § 900.10), which he did here. In fact, the ALJ listed three pages of corrections to the rulemaking record, including a correction on page 161. But he made no correction on pages 162 or 163, involved here. Hence, petitioner's challenge to the accuracy of the record must fail.

rulemaking hearing, used only Grade A milk (Tr. 170). MMI received only Grade A milk at its plants (Tr. 160-61). The fact cited by the ALJ that evaporated plants are a significant outlet for Grade B surplus was, therefore, irrelevant to the Secretary's inquiry into which uses of milk regulated under the Order, *i.e.*, Grade A, were adversely affected by and would be the primary outlets for the extra milk surplus expected within the Order 33 system.

The ALJ also bases his finding that evaporated milk was a primary surplus milk outlet on petitioner's testimony that, historically, its "highest purchase months have been the Spring flush months" (Initial Decision at 26; citing Tr. 169, 179). However, this testimony is quoted out of context. Other portions of petitioner's testimony make it clear that petitioner was not referring to the *recent* past in that statement. Petitioner admitted that, in recent years, at the "present price" (*i.e.*, without the proposed price reduction), petitioner was buying less in the spring flush period, because its sales were low then and it could not afford to carry inventory over to its peak sales period of November and December (Tr. 169-70, 179). Petitioner's reference to this admission in its rulemaking brief bolsters this interpretation of petitioner's testimony on this point. Specifically, in the Proposed Findings and Brief Submitted on Behalf of Defiance Milk Products Company, Docket No. A0-166-A51, A0-179-A46, at 2, petitioner states:

7. The largest sales period for evaporated milk products is in November and December. In recent years, the costs of carrying inventory and the price of milk has made it uneconomical for Defiance to inventory, for sale in November and December, products made from the abundant milk supplies in the spring flush. (Tr. 169-70)

Furthermore, petitioner's witness stated that petitioner had already refused to accept any extra loads of milk in the spring of 1983 and would not be available as an outlet for the surge in surplus in 1983 if it did not get the benefit of the proposed temporary price cut (Tr. 173-74, 176-77). Specifically, petitioner testified on cross-examination as follows (Tr. 173-74, 176-77):

Q You state that this flush would intend to build up a smaller inventory than you have had in previous years; is that correct or did I misunderstand.

A The inventory depends on what we can buy milk for.

Q So that if the price remains at the M-W or the Class 3 level and your competitor finds milk for \$1.50 below

that, you will not inventory as much as you might if you got the 40¢ reduction in the 3A price?

A That's right.

Q And you have manufacturing capacity that is available to suppliers of the Order 33 and 36 area if the Secretary adopted the decision for reduction for the Class 3 price on condensed and evaporated milk in addition to other products?

A Well, it certainly would have some bearing on our inventory.

Q Do you have capacity available for other suppliers of milk; in other words—

A (Interposing) Yes.

Q In other words, if MMI had a load of milk that was available to you at the Class 3A price, you would seriously consider adding to your inventory or expanding your manufacturing process and take that load of milk if the price was reduced?

A If the price were right, yes.

Q If the price remained at the present level, that milk might have to go to Wisconsin?

A That, I couldn't tell you.

* * * * *

Q Mr. Speiser, has your company ever been approached in or during the flush season to take extra loads of milk from sources you don't normally buy from?

A Yes, sir.

Q Have you taken the milk?

A Yes, sir, when we could handle it.

Q Have you been approached this year with respect to the coming months?

A Yes, sir we have

Q Have you indicated whether or not you would take that milk?

A No, sir, we have not.

Q You have not offered to take it?

A No, sir.

Q But would you consider taking it at 40, the lower price, is that it?

A We would consider it.

Evidence that (1) a majority of the problematic 1983 surplus surge would be used to make butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), (2) petitioner had cut back on spring purchases of surplus milk in recent years, and (3) petitioner's plant would not be available to take any extra milk in 1983 without price relief, and would only "consider" whether to take it even with price relief, amply supports the Secretary's finding that butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) were the primary outlets for the temporary surge in Grade A surplus, and that evaporated milk was not.

The fact that milk used for evaporated milk had always been priced the same as milk used for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) is a weighty, relevant circumstance in considering the long-range classification of the products. If any long-term change were to be made, consideration would have to be given to the historical relationship, and the reasons for the historical relationship. But the historical relationship is entitled to zero weight in considering how to deal with a temporary, 2-month emergency situation that substantially reduced the value of milk used for butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd), but not for evaporated milk.

Similarly, the ALJ's reliance (Initial Decision at 26) on petitioner's testimony that evaporated milk is "interchangeable for many uses with non-fat dry milk" (Tr. 170) is misplaced when we are considering a temporary, 2-month amendment. Furthermore, petitioner's testimony that evaporated milk is interchangeable for many uses with nonfat dry milk is ambiguous. It is unclear whether petitioner was referring to handler or consumer use of the product. However, it is extremely unlikely that a product such as petitioner's, packed in small, metal, hermetically sealed containers could be economically feasible or practicable for another handler to use in its operation in place of nonfat dry milk. Practically speaking, petitioner must have been referring to consumer use of the product.

However, it is well-settled under the Act that the Secretary need not take ultimate consumer use of milk products into account when classifying milk in accordance with the form in which it is used. *Queensboro Farms Prods., Inc. v. Wickard*, 137 F.2d 969, 975-77 (2d Cir. 1943.) As classification in accordance with form of use may refer strictly to handler and not consumer use, it cannot be unlawful for the Secretary to classify handler milk uses differently even in the face of record evidence that consumer uses of the products may be similar.

The ALJ also relied on the fact that MMI did not oppose petitioner's proposal if petitioner could "make a case for themselves" (Initial Decision at 27). However, the fact that MMI did not oppose the adoption of petitioner's proposal at the rulemaking hearing, if petitioner could make a case for itself, does not add weight to the evidence presented in support of petitioner's proposal. Petitioner still was required to make a case for itself, which it failed to do.

The ALJ was further persuaded (Initial Decision at 27) by petitioner's testimony that a price reduction would enable it to assist in clearing the market of flush milk supplies, because a reduced raw product cost would make petitioner more competitive and, thus, would "open up the possibility of additional use [by petitioner] of the present milk surplus in Order 33" (Tr. 171). This direct testimony must be weighed with the clarification adduced by cross-examination, quoted above, that petitioner would not take on extra surplus milk without price relief and would merely *consider* taking it on with price relief (Tr. 173-74, 176-77). Petitioner's availability as an outlet for the 1983 surge in surplus was, thus, contingent and speculative.

Nevertheless, even if the Secretary accepted petitioner's direct testimony at face value, *i.e.*, that it would help clear the market if its proposal were adopted, such evidence does not compel the Secretary to adopt the proposal when exercising his discretionary authority as to how best to deal with the temporary surplus problem in the market which the record evidence presented. "The existence of regulatory alternatives . . . is not cognizable on review" (*In re Schepp's Dairy, Inc.*, 35 Agric. Dec. 1477, 1498 (1976), *aff'd*, No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd*, 628 F.2d 11 (D.C. Cir. 1979)). As stated in *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 319 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969):

If there are alternatives to the Order as framed we are persuaded, as argued on behalf of the Secretary, that the wisdom of his choice of the alternatives is not cognizable in this proceeding. Only the legality of his choice is in

issue here. The fact that regulation may be achieved that is equally as efficacious for the purpose of the Act with less expense to Lewes does not render illegal the application of the Order to Lewes.

Where alternative methods to administrative action are available, the responsibility for selecting the best means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. *Illinois Cent. R.R. Co. v. Norfolk & W. Ry. Co.*, 385 U.S. 57, 69 (1966); *Secretary of Agriculture v. Central Roig Ref. Co.*, 338 U.S. 604, 610-14 (1950); *American Power & Light Co. v. SEC*, 329, U.S. 90, 112 (1946); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319, *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. Dec. 17, 1976).

Consequently, this proceeding is not concerned with whether petitioner's proposal presented a viable alternative for dealing with the temporary surplus problem, but with whether the regulatory solution chosen was in accordance with law. The Secretary chose to respond to the demonstrated change in market conditions by reclassifying, in effect, only those milk uses which were shown, unlike petitioner's milk usage, to be unavoidably subject to specific, measurable devaluation factors as a result of the supply situation, and which uses would inevitably absorb most of the 1983 surge of surplus. That choice is not made unlawful by the mere existence of petitioner's proposal as an alternative regulatory solution, even if one were to assume, *arguendo*, that the proposal were supported by substantial evidence.

The ALJ further ruled that the Secretary's decision in this matter represented "an arbitrary price classification in abuse of his discretionary powers" because the reclassification resulted in a price reduction for milk used in both storable and non-storable products, but excluded price relief for milk used in petitioner's storable evaporated product (Initial Decision at 28). The ALJ's reasoning that products must be classified uniformly according to their storability ignores the history of Order No. 33, the reasoning of the Secretary's amendment decision and the evidence on which that decision was based.

Before the Order was temporarily amended, Class III included, *inter alia*, the following products which have varying capacities for storage: butter, nonfat dry milk, dry whole milk, dry whey, dry buttermilk, casein, cheese (except cottage cheese and cottage cheese curd), frozen cream, certain milk shake mixes, frozen desserts and mixes, dietary products and infant formulas in hermetically sealed

containers, evaporated milk, condensed milk, and skim milk. 7 CFR § 1033.41(c)(1).

At the amendment hearing, none of the cooperative proponent's testimony established the varying degrees of storage capacity of any milk uses or the need to treat storable manufactured milk uses differently than less storable manufactured uses. Petitioner referred to the storability of its products when describing its products in its testimony (Tr. 169). However, petitioner did not advance in the reasons it gave at the hearing for its proposal that storable products should be classified and priced identically based on their degree of storability. In fact, at the hearing petitioner proposed that all Class III products (including ice cream and other less storable products) be included in the price relief (Tr. 170). This proposal logically precluded any testimony on petitioner's part that manufactured products should be classified on the basis of their degree of storability.

At the time petitioner filed its post-hearing rulemaking brief, it had modified its proposal to include only evaporated and condensed milk (Proposed Findings and Brief Submitted on Behalf of Defiance Milk Products Company at 3). At that time, petitioner's attorney argued for the first time that butter, nonfat milk and cheese had been singled out for price relief because they were products with a long shelf life. *Id.* at 5. Petitioner's attorney continued this line of argument in this § 8c(15)(A) proceeding (Proposed Findings and Brief Submitted on Behalf of Petitioner at 12-13). Petitioner's analysis of the importance of shelf life as a factor in the rulemaking decision is completely in error, and the ALJ's reliance on that factor is unfounded.

The rulemaking decision reveals that the shelf life of various products was not a relevant, determinative factor in deciding which products would be temporarily reclassified for 2 months of the 1983 flush season. The decision focuses, rather, on the measurable amounts by which the value of surplus milk going to certain uses would be depressed (Finding 14). Nowhere does the decision focus on the comparable storage capacity of manufactured products *vis a vis* each other (which was not even established at the rulemaking hearing).

The use of the word "storable" in the amendment decision with respect to the products being reclassified is merely a descriptive characterization; *i.e.*, Class III products like butter, nonfat dry milk and cheese (including soft cheeses like provolone) are more storable than fluid milk. For example, when the decision states that the "surplus milk is processed into storable manufactured dairy products, primarily butter, nonfat dry milk and cheese" (48 Fed. Reg.

22,313, 22,315 (1983)), the use of "storable" is merely descriptive. The fact that storability was not a criterion for determining the products to be included in the price relief is conclusively established by the Secretary's statement that the price reduction "does not apply to some storable products such as canned milk and blends of margarine and butter, for which there was no demonstration on the record that handlers incur losses in marketing milk for such uses" (48 Fed. Reg. 22,313, 22,316 (1983)).

As a result of the rulemaking proceeding, some Class III products were temporarily reclassified and some were not depending on the evidence as to the temporarily reduced value of milk for certain uses resulting from the extreme surplus situation. The products given the price break included both very storable products like nonfat dry milk and less storable products like soft cheese. Also, the classification of products remaining in Class III included very storable products like evaporated and condensed milk and less storable products like ice cream. How products were classified depended on economic evidence relating to the value of milk used in certain forms rather than on evidence as to comparable storage capacity.

The only point in the rulemaking decision where storage capacity is discussed in a substantive fashion is where the Secretary is responding to opposition arguments that the reclassification would disrupt finished product markets (48 Fed. Reg. 22,313, 22,316 (1983)). The Secretary's reasoning in rejecting such opposition includes, *inter alia*, a reference to the storable nature of the reclassified products, a factor which would tend to prevent an immediate dumping of the reclassified products in the finished product market. *Id.*¹⁴ This reasoning does not suggest that storage capacity was a decisive factor in determining which uses should be reclassified since the very next sentence in the rulemaking decision refers to the exclusion of certain storable products for lack of substantial evidence. *Id.*

In summary, the ALJ erred in accepting petitioner's argument that storability was a significant factor in the rulemaking decision, and that the exclusion of a very storable product like evaporated milk from the temporary reclassification was, thus, arbitrary. The

¹⁴ The Secretary also explains that the effects on the finished product market would be minimized by limiting the price relief "to only the amount of the extraordinary losses incurred" (*id.*). Furthermore, the Secretary explains that the finished products are "essentially floored in effect at the levels established under the dairy price support program" (*id.*). As MMI testified, irrespective of manufacturing costs its sales price would be the price established under the price support program (Tr. 67-68).

record and decision clearly demonstrate that the temporary reclassification was applied only to those uses shown to be the primary outlets for the expected surge in surplus, since milk for those uses was temporarily reduced in value. The ALJ erred in allowing petitioner to interject a factor which was not relevant to the Secretary's decision and, thus, cannot be used after the fact to find the decision arbitrary. Since there is no requirement in the Act or in reason that the Secretary classify milk uses identically according to their degree of storability, there is no basis for finding that a classification not based on such a factor is arbitrary.

Finally, petitioner relies on evidence adduced at the § 8c(15)(A) hearing in this proceeding that was not before the Secretary in his rulemaking capacity (Brief of Defiance Milk Products Company in Opposition to Respondent's Appeal Petition at 4 n.3, 7, 15 n.6, 18 n.7, 22 n.11). It is well-settled that such evidence cannot be considered here. As stated in *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1727 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319, *aff'd mem.*, 1546 F.2d 1043 (D.C. Cir. Dec. 17, 1976):

Second, the Order must stand or fall upon the basis of the evidence before the Secretary adduced during the promulgation proceedings. Additional facts presented in the 8c(15)(A) proceeding are not relevant to the substantial evidence issue. "To allow evidence [in the 8c(15)(A) proceeding not presented in the promulgation proceeding] would be to reopen, rather than to judge, the promulgation proceeding." *United States v. Mills*, *supra*, 315 F.2d 829, 836 (C.A. 4). Accord: *Dairymen's League Cooperative Ass'n v. Branman*, 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; *In re Terrace Park Dairy*, 12 Agriculture Decisions 1383, 1396-1397 (1953); *Sprague Dairy Co. v. Anderson*, 6 Agriculture Decisions 729 (N.D. Ill.). See, also, *Acme Fast Freight, Inc. v. United States*, 154 F. Supp. 239, 241 (S.D. N.Y.).

For the foregoing reasons, substantial evidence did not support including evaporated milk in the temporary, new Class III(A), but even if it did, it would not have been arbitrary, capricious or an abuse of discretion for the Secretary to choose the regulatory alternative which he chose to solve the temporary problem presented by the extraordinary spring surge of milk in 1983.

III. If the Secretary's Temporary Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.

After concluding that it was unlawful for the Secretary to refuse to adopt petitioner's proposal, the ALJ ruled (Initial Decision at 28):

The result of the Secretary's action was that petitioner was required to pay 40 cents per hundredweight more for producer milk than its competitors marketing other Class III products. The proper remedy in such circumstances is for the Market Administrator of Order 33 to reimburse petitioner the amount of this overcharge.

In the first place, petitioner was not required to pay more for milk than its competitors making evaporated milk or any of the other 14 products remaining in Class III. Only handlers making butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) benefited from the temporary price reduction. All handlers of the 15 products remaining in Class III, including other handlers making evaporated milk, continued to pay the same basic formula price previously set by a valid rulemaking proceeding.

But even if the Secretary's rulemaking action were held to be unlawful, the proper course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioner.

If, for example, the Secretary's temporary rulemaking action were held unlawful because the Secretary failed to explain in his rulemaking decision that he was actually reclassifying milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in a new Class III(A), priced 40¢ less than the basic formula price applicable to Class III, the obvious remedy would be for the Secretary to amend his findings and conclusions, which would eliminate the illegality.

If, on the other hand, it were held (i) that substantial evidence does not support putting butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A), or (ii) that it is unlawful to include butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A) without also including evaporated milk, the Secretary might (a) want to hold a new hearing to determine *nunc pro tunc* what temporary action should have been taken (which could take anyone of numerous forms), (b) acquiesce in the determination of illegality and annul the temporary rulemaking

action as to all handlers, or (c) include evaporated milk (and perhaps other products) in the temporary, new Class III(A). There would be no basis for binding the Secretary to take only one action, viz., include evaporated milk, but none of the other 14 products that would remain in Class III, in the new Class III(A).

Where it has been administratively determined that the Secretary's rulemaking action is unlawful, it has been the practice in this Department for more than 40 years to remand the proceeding to the Secretary, rather than for the ALJs or the Judicial Officer to take corrective rulemaking action. See, e.g., *In re Borden, Inc.*, 37 Agric. Dec. 987, 997-1000 (1978), *remanded*, 38 Agric. Dec. 1061 (1979), *dismissed per settlement agreement*, 40 Agric. Dec. 1711 (1979); *In re The Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

Even during the period prior to 1980, when the delegation of authority to the Judicial Officer included authority to perform "any regulatory function" (7 CFR § 2.35 (1979)), which is not now in the Judicial Officer's delegation of authority (7 CFR § 2.35 (1984)), in actual practice, the Judicial Officer always refrained from exercising any rulemaking function. *Flavin*, "The Functions of the Judicial Officer, USDA," in 26 Geo. Wash. L. Rev. 277, 278 n.9 (1958) (written by the Department's Judicial Officer from 1942 to 1972).

In similar situations, courts also frequently remand proceedings for further administrative consideration. See, e.g., *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc. v. Bergland*, *supra*; *Rodway v. USDA*, 514 F.2d 809, 17-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See, e.g., *Blair v. Freeman*, 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also, *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Sec-

retary could retrospectively apply new regulation to impounded funds); accord *United States v. Morgan*, 307 U.S. 183, 185-98 (1939).

Courts have, however, awarded relief to prevailing parties in some cases distinguishable from the present case. In *Fairmont Foods Co. v. Hardin*, 442 F.2d 762 (D.C. Cir. 1971), a handler challenged the 1965 promulgation of a higher Class I price applicable to its plant location and requested a refund of the difference between the pre-1965 price and the higher price it had been forced to pay between 1965 and 1968 as a result of the amendment. *Id.* at 766 n.16. The court set aside the amendment because the rulemaking record did not contain substantial evidence to support it. *Id.* at 767. The court concluded that the plaintiff was entitled to recover the "overpayments which it made pursuant to this invalid Order." *Id.* at 773.

In *Fairmont Foods*, the court held that the handler should only have paid the price set by the valid Order provision which preceded the invalid amendment, and that the "overpayments" should be returned to the handler. In the present case, however, the price petitioner paid for milk in June and July 1983 was the same price it had been paying which had been set by a valid Order provision not even challenged in this proceeding. There is no prior, valid price to revert to, as in *Fairmont Foods*, because the prior, valid price is the one which petitioner paid in this case.

Similarly, in *Borden, Inc. v. Butz*, 544 F.2d 312, 319-20 (7th Cir. 1976), and *Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz*, 584 F.2d 12, 16-21 (3d Cir. 1978), handlers challenged order amendments which raised the Class I price for their milk above the level at which it had been previously set. The courts found insufficient evidence for the amendments, and, therefore, held that they were invalid. The handlers' recoveries were based on the fact that they had paid a price set by invalid Order provisions. But, as stated above, here petitioner's price for milk was set by a prior, valid Order provision. Accordingly, those cases are not analogous to the situation here.

In the present case, if the Secretary's temporary, rulemaking action were held unlawful, I would adhere to the Department's settled practice for over 40 years, and remand the proceeding to the Secretary for further legislative consideration. That action is particularly appropriate here in view of the numerous, reasonable options available to the Secretary, if his original, temporary action were held invalid.

IV. If an Award Were Made to Petitioner, Interest Would Not Be Appropriate.

The ALJ properly determined here that interest should not be awarded to petitioner (Initial Decision at 29-31) 'There is no provi-

sion in the Act for an award of interest to a handler prevailing in a § 8c(15)(A) proceeding. Accordingly, where a handler has been awarded money in a § 8c(15)(A) proceeding, interest has never been awarded. See, e.g., *In re Lawson Milk Co.*, 22 Agric. Dec. 126, 22 Agric. Dec. 455, 456-59 (1963), *aff'd*, 358 F.2d 647, 649-50 (6th Cir. 1966); *In re M.H. Renken Dairy Co.*, 14 Agric. Dec. 794, 807 (1955).

There is a reserve of funds in the producer-settlement fund which is available each month, and which is referred to as the unobligated balance in the producer-settlement fund. 7 CFR § 1033.70 (1983). Money is constantly clearing into and out of the reserve part of the producer-settlement fund each month, so at times the unobligated amount is as high as \$300,000, but more frequently is about half that amount. Any award of money to a § 8c(15)(A) petitioner would be paid out of this reserve, and would reduce the blend price to the producers in the market during the month such payment is made. Such producers would not necessarily be the same group of producers as those on the market in June and July 1983 when the contested amendment to the Order was in effect.

In denying petitioner's request for interest on the money he awarded in the present case, the ALJ relied on *Lawson Milk Co. v. Reeman*, 358 F.2d 647, 649-50 (6th Cir. 1966). In *Lawson*, the United States Court of Appeals for the Sixth Circuit, which is the circuit that includes the Order No. 33 marketing area, affirmed a ruling by the Judicial Officer that a claim for interest was properly disallowed where the milk Order did not provide for it.

Order No. 33 had no provision for any interest or late payment charge when petitioner instituted this proceeding. Subsequently, the Order was amended to provide limited late payment charges only on accounts due *from handlers* to the Market Administrator.

Fed. Reg. 36,072, 36,077 (1984), to be codified in 7 CFR § 1033.78. At the time that this section was adopted, the Secretary declined to adopt proposals (by Defiance Milk Products Co.) that Order No. 33 allow for interest to be paid *to handlers* when money is refunded to them either *as the result of* an audit adjustment *or a successful § 8c(15)(A) petition*. 49 Fed. Reg. 35,101, 35,112-13 (1984). Accordingly, there would be no basis here for awarding interest to petitioner.

I should note that I disagree with the Secretary's reasoning declining to adopt petitioner's proposal to award interest to a successful § 8c(15)(A) petitioner. The Secretary's Decision states (49 Fed. Reg. 35,101, 35,112-13 (1984):

The other situation covered by the proposal dealt with contested obligations in a 15(a) proceeding. The record does not warrant changing the order to accommodate this situa-

tion either. In fact, where order obligations are in dispute in a 15(A) proceeding, at times it might be appropriate to escrow disputed amounts to protect the parties of interest.

The only purpose of adopting a late-payment charge under the order is to encourage handlers to pay their obligations on time and not to provide for payment of interest on outstanding obligations. This is essential so that the market administrator can make the required payments to producers, cooperative associations, or handlers who elect to pay their producers at the time specified in the order. If interest were to apply on certain refunds due handlers, as Defiance urges, the order would represent a banking service for handlers. That is not the purpose of a Federal milk order. Hence, the handler proposal most appropriately should be denied.

Two reasons are given by the Secretary for declining to adopt petitioner's proposal.

First, the Secretary states that "at times it might be appropriate to escrow disputed amounts to protect the parties of interest." The problem with that approach is that it is difficult, or impossible, to determine at the outset of most § 8c(15)(A) proceedings whether the petitioner will ultimately prevail, in whole or in part. (This view is based on my personal experience in deciding numerous milk cases during the last 14 years.) Hence, unless escrow accounts were to be routinely established, there would be no intelligent method for selecting the cases appropriate for escrow accounts.

Moreover, the possibility of an escrow account would be no comfort to a successful petitioner in a case where the Department rejected its request for an escrow account. In fact, by establishing a policy that lets the Department pick and choose the cases in which petitioners will be protected by an escrow account, if successful, the Department is guaranteeing a lack of equity between handlers. Some successful § 8c(15)(A) petitioners will receive interest, where the money has been escrowed. Others will not, where the money has not been escrowed.

The second reason advanced by the Secretary for rejecting petitioner's proposal is that if "interest were to apply on certain refunds due handlers, as Defiance urges, the order would represent a banking service for handlers."

Nonsense!

If a successful § 8c(15)(A) petitioner were to be awarded interest it would not represent a banking service for the handler. Money mistakenly taken from (or not given to) a successful § 8c(15)(A) pet

tioner was not voluntarily given to (or left with) the Market Administrator. Petitioning handlers do not seek the Department's "banking service." Rather, the Department uses the full force of the judicial system to compel a handler to pay now—litigate later. *United States v. Ruzicka*, 329 U.S. 287, 288-95 (1946).

Although I disagree completely with the reasons given by the Secretary in his legislative capacity for denying interest under Order No. 33 to a successful § 8c(15)(A) petitioner,¹⁵ it is not my function to judge the wisdom of the Secretary's action in refusing to adopt a proposed amendment to an Order. (In addition, the Secretary's rulemaking action in refusing to amend Order No. 33 to provide for interest has not even been challenged in this § 8c(15)(A) proceeding.) Accordingly, if I were to agree with the ALJ that an award should be made to petitioner, I would agree with his decision to deny interest.

In *In re Borden, Inc.*, 38 Agric. Dec. 1061, 1062-72 (1979), *dismissed per settlement agreement*, 40 Agric. Dec. 1711 (1979), the Judicial Officer suggested that interest might be appropriate in considering all of the equities of the situation. (It was also held that recovery of the overcharges under an invalid Order provision is not automatic, but depends on a consideration of all the equities (38 Agric. Dec. at 1062-71)). However, there was no indication in *Borden* that the Secretary had ever given legislative consideration to the question of interest, as has been shown here. Hence, *Borden* is no longer persuasive as to the possibility of interest. (Moreover, interest was not actually awarded in *Borden* since the case was settled by the parties.)

For the foregoing reasons, the following Order should be issued.

ORDER

The petition for relief under § 8c(15)(A) of the Act is dismissed on the merits.

¹⁵ This is not to suggest that there may not be other logical reasons, not stated, for denying interest, e.g., to protect the interests of producers, who were not at fault, and who may not even have been in the pool when the pool had the benefit of the money involved in the § 8c(15)(A) proceeding.

In re: COUNTY LINE CHEESE COMPANY, INC., COUNTY LINE CHEESE COMPANY, DIVISION OF BEATRICE FOODS CO., and MEADOW GOLD DAIRY, DIVISION OF BEATRICE FOODS CO. AMA Docket No. M49-1. Decided February 12, 1985.

Challenge to audit adjustments—Pooled milk—Reversal of decision—Dismissal of Petition.

The Judicial Officer reversed Judge Baker's Order which upheld petitioner's challenge of audit adjustments by the Market Administrator of the Indiana Milk Order that cost petitioners \$328,003.44. The burden of proof in a 15(A) proceeding rests with petitioners. Meadow Gold Dairy, a handler operating a pool distributing plant, and County Line Cheese Company, a handler operating a supply plant, are both wholly-owned subsidiaries of Beatrice Foods Company. The Market Administrator correctly concluded that County Line did not qualify under the order as a pool plant from September 1980 through February 1981 because 50% of its qualifying receipts were not pumped into and out of Meadow Gold's distributing plant tank before it was sent to County Line's Auburn Cheese Plant. The administrative construction of a regulation is entitled to great weight. The order as interpreted by the Market Administrator is supported by reasoned agency decisionmaking. If circumstances change, making order provisions no longer applicable to present factual conditions, a handler must seek relief through the order amendment procedure. Courts may not accept appellate counsel's *post hoc* rationalizations for agency action. The requirement that milk be pumped into and out of a distributing plant was upheld in *Michael's Dairies* under the diversion provisions because the added expense was necessary to prevent too much manufacturing milk from being associated with the pool. If the Secretary had failed to engage in reasoned agency decisionmaking, it would have been appropriate to remand the proceeding to the Secretary for the purpose of issuing revised findings. The "down allocation" and compensatory payment provisions as to other source milk are in accordance with law. It is customary for the Secretary to determine which milk handlers and handling of milk shall be included in a marketwide pool, and which dairy farmers shall be included as producers. All federal orders give priority to producers in the pool in the assignment of milk to Class I utilization. That was upheld in *Bailey Farm Dairy*. The requirement that Meadow Gold make a compensatory payment into the pool equal to the difference between the Class I price and the blend price paid to producers on that portion of County Line's (other source) milk that retained the Class I classification is not a trade barrier in violation of section 8c(5)(G).

John H. Vetne, Peterborough, New Hampshire, for petitioner
Garrett B. Stevens, for respondent.
Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This proceeding was instituted under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)),¹ by petitioners challenging the validity of audit ad-

¹ (15) *Petition by handler for modification of order or exemption; court review; ruling of Secretary*

justments by the Market Administrator of the Order Regulating the Handling of Milk in the Indiana Marketing Area (7 CFR Part 1049) that would cost petitioners \$328,003.44.

The audit adjustments resulted from the Market Administrator's determination that when County Line Cheese Company (County Line) shipped milk from its supply plant in Shipshewana, Indiana, to its unregulated cheese plant in Auburn, Indiana, it did not first haul the milk 15 miles out of the way to Meadow Gold Dairy's pool distributing plant in Fort Wayne, Indiana, pump the milk into Meadow Gold's tank, and immediately pump the milk back into the same truck, before proceeding to the cheese plant in Auburn. The Market Administrator was not concerned with the fact that the milk was ultimately going to the unregulated cheese plant, but only with the fact that, enroute, the milk was not pumped into and out of the distributing plant's tank.

On August 8, 1984, Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial decision and order in which she held that the petitioners were entitled to the relief they seek because the Market Administrator unlawfully construed § 7(b) of the Order (7 CFR § 1049.7(b))² "to require that [County Line's] supply plant milk not only be 'shipped to' distributing plants, but also that such milk be physically pumped over into the distributing plant [Meadow Gold] to be considered a [qualifying] shipment" for determining "pool plant" status, and because § 7(b), as construed by the Market Administrator, "is arbitrary, capricious and an abuse of discretion,

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

² § 1049.7 *Pool plant.*

Except as provided in paragraph (c) of this section, "pool plant" means:

(b) A supply plant from which not less than 50 percent of the Grade A milk received from dairy farmers and handlers pursuant to § 1049.9(c) at such plant during the month is shipped to [distributing] plants qualifying for the month pursuant to paragraph (a) of this section. A plant qualified pursuant to this paragraph in each of the immediately preceding months of September through February shall remain so qualified for the months of April through August unless written application is filed with the market administrator on or before the first day of any such month to designate such plant as a nonpool plant for such month and for each subsequent month through August during which it would otherwise not qualify under this paragraph.

and otherwise not in accordance with law, because it is not supported by sound rationale and other requirements of reasoned decisionmaking under the Administrative Procedure Act" (Initial Decision at 172-73).

* * * * *

The ALJ also indicated, without deciding the matter, that even if the Market Administrator's determinations under § 7(b) were otherwise valid, the audit adjustments would be invalid because (i) under 7 CFR § 1049.44, when County Line's milk was treated as "other source" milk rather than "producer" milk pooled under the Order, most of it was no longer classified as Class I, but was "down-allocated" to Class III, and a comparable amount of Meadow Gold's "producer" milk, previously classified mostly as Class III, was "up-allocated" to Class I, requiring Meadow Gold to pay the difference between the Class III and Class I prices on the "up-allocated" milk; and (ii) on that portion of the "other source" milk received by Meadow Gold from County Line that retained a Class I allocation, Meadow Gold was required under 7 CFR § 1049.71 to make a compensatory payment to the producer-settlement fund equal to the difference between the weighted average (blend) price and the Class I price. The ALJ indicated, without deciding the matter, that these provisions of the Order, as applied to petitioners, (i) violate 7 U.S.C. § 608c(5)(A), which requires that Orders provide a method for fixing uniform, minimum class prices, which all handlers shall pay for milk purchased from "producers or associations of producers," and (ii) create a trade barrier, in violation of 7 U.S.C. § 608c(5)(G).

Respondent and petitioners appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).³ The case was referred to the Judicial Officer for Decision on November 19, 1984.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 900.65(b)(1)), was requested by respondent, but is denied inasmuch as the issues on appeal have been thoroughly briefed and

³ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1069 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

oral argument would not seem to be helpful. However, a Tentative Decision and Order was filed by the Judicial Officer, with further briefs filed by petitioners and Associated Milk Producers, Inc. (AMPI), pursuant to permission granted under 7 CFR § 900.57.

For the reasons set forth below, the Market Administrator's audit adjustments were in accordance with law.

Milk marketing orders issued under the Act provide for the classification of milk in accordance with the form in which or the purpose for which it is used, and the payment to all producers delivering milk to all handlers under a particular order of uniform minimum prices for all milk so delivered. In general terms, Order No. 49 involved here classifies milk disposed of in fluid form as the highest value class, Class I, milk disposed of in soft products such as eggnog and yogurt in Class II, and milk used to produce hard products, such as cheese and butter, in Class III, the lowest value class.

The procedure for paying producers and charging handlers for milk is generally as follows (*Grant v. Benson*, 229 F.2d 765, 767 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956)):

The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions. . . . The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform [blend] price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.⁴

⁴ In view of the different situations in the various milk marketing areas, there is a wide variation in the pricing provisions of the orders. For a general description of the milk marketing regulatory program under the Act, see *Lehigh Valley Coop*

Since about 88% of County Line's milk was used to make cheese (Class III, the lowest valued product) at its cheese plant during the relevant period, it would have been greatly advantageous to County Line to qualify as a "pool plant" so that it could have drawn from the producer-settlement fund the difference between the Class III price and the uniform blend price. But since pooling County Line would have lowered the blend price paid to all producers, it was important for the Market Administrator to be sure that County Line met all of the lawful qualification requirements for pool plant status. (If pooled, County Line would have drawn \$199,221.74 from the pool just from September 1980 through January 1981, and it would have remained pooled for the entire year.)

My disagreement with the ALJ is based on questions of law—not on differences as to the facts. The facts set forth below are taken verbatim from the ALJ's findings, with omissions indicated by dots and additions contained in brackets.⁶ Many of the ALJ's findings are omitted since they are irrelevant under my *present* view of the case.

FINDINGS OF FACT

1. Petitioner, County Line Cheese Co., Inc., a wholly-owned subsidiary of Beatrice Foods Co., is a corporation incorporated under the laws of the State of Delaware with the following address and principal place of business, R. R. 2, Auburn, Indiana 46707.

2. County Line Cheese Company, an operating division of Beatrice Foods Co. was the predecessor of County Line Cheese Company, Inc., operating as a division prior to its incorporation on January 30, 1981. Its address and principal place of business was the same as County Line Cheese Company, Inc.

3. Meadow Gold Dairy is an operating division of Beatrice Foods Co. with its offices and principal place of business at 1501 Fairfield Avenue, Fort Wayne, Indiana 46802.

4. Beatrice Foods Co. is a corporation, incorporated under the laws of the State of Delaware, with principal corporate offices located at Two North La Salle Street, Chicago, Illinois 60602. Beatrice Foods Co. was incorporated on November 11, 1924.

Farmers, Inc. v. United States, 370 U.S. 76, 78-81 (1962), *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 542-45 (1939); *Faumont Foods Co. v. Hardin*, 442 F.2d 762, 764 (D.C. Cir. 1971). See generally Vetne, "Federal Marketing Order Programs," in 1 *Agricultural Law* ch. 2 (J. Davidson ed. 1981); Brooks, *The Pricing of Milk under Federal Marketing Orders*, 26 Geo. Wash. L. Rev. 181 (1958).

⁶ The ALJ's footnote numbers in her Findings of Fact have not been changed, but some have been omitted. Hence the footnote numbers in this decision follow consecutively, but some footnote numbers are omitted.

5. County Line Cheese Company, Inc., a subsidiary of Beatrice Foods Co. (formerly County Line Cheese Company), is or has been a "handler" as that term is defined in Section 9 of the Indiana Federal Milk Marketing Order (7 CFR, Sec. 1049.9) in that it operates a . . . supply plant (located in Shipshewana, Indiana) [that at times was a "pool" plant] regulated pursuant to Section 7(b) of the Order (7 CFR, Sec. 1049.7(b)). County Line Cheese Company also operates an unregulated manufacturing plant located in Auburn, Indiana.

6. The two County Line Cheese Company plants (Shipshewana and Auburn) are located in Northeast Indiana, a portion of the Indiana Market in which milk production by dairy farmers is relatively heavy.

7. During the relevant period of 1980-1981, the Shipshewana supply plant operated by County Line Cheese Co. received or reported approximately 8.3 to 9.2 million pounds of Grade A milk from producers [or dairy farmers] each month. Approximately 95% of this Grade A milk supply is produced by independent dairy farmers; *i.e.*, dairy farmers who have elected not to be members of a cooperative association. . . .

8. Meadow Gold Dairy, a division of Beatrice Foods Co., is or has been a "handler" as that term is defined in Section 9 of the Indiana Federal Milk Marketing Order (7 CFR, Sec. 1049.9) in that it operates a pool distributing plant, regulated pursuant to Sec. 7(a) of the Order (7 CFR, Sec. 1049.7(a)). Meadow Gold bottles and sells fluid milk products; it sells Class II products purchased from another plant; it transfers milk it does not need to manufacturing plants for surplus use in Class III products.

9. The distributing plant of Petitioner, Meadow Gold Dairy, Fort Wayne, Indiana, is the sole fluid outlet for the Grade A milk supply associated with County Line Cheese Company. Meadow Gold Dairy processes milk which it receives into various Class I products; markets Class I and Class II products on routes and to other plants; and ships Grade A milk not needed for other disposition by the distributing plant to various manufacturing facilities including the County Line Cheese plant located in Auburn, Indiana.

10. The County Line supply plant serves as one of three sources of fluid milk for Meadow Gold, Fort Wayne, Indiana. In this capacity, the supply plant serves to balance the fluid needs of Meadow Gold by leaving milk for Meadow Gold's use on heavy bottling days (high demand) and by providing a manufacturing outlet (at Auburn) for surplus milk production in excess of the needs of Meadow Gold.

11. The highway mileage from Shipshewana to Meadow Gold is 58 miles; from Meadow Gold to Auburn is 17 miles; and from Shipshewana to Auburn is 60 miles.

12. The use of the County Line producer milk supply by Meadow Gold for fluid (bottling) purposes has first priority over other uses such as for manufacturing. (Tr. 270, 300).

13. The Petitioners, on brief, have graphically depicted the daily variation of the volume of County Line supply plant milk retained by Meadow Gold for fluid (bottling) purposes, in terms of percentage of all County Line milk retained by Meadow Gold. . . . The graph [footnote omitted] shows that the volume of County Line supply plant milk retained by Meadow Gold for fluid purposes varied considerably from day to day, depending upon the bottling schedule and demands at the Meadow Gold distributing plant. A monthly breakdown by day of milk received by Meadow Gold and kept for bottling in September and October, 1980, shows:

	Sep- tember 1980	Octo- ber 1980
Sunday	49,340	24,120
Monday	295,520	196,860
Tuesday	394,000	269,620
Wednesday	49,440	None
Thursday	197,540	296,000
Friday	115,340	156,580
Saturday	None	

14. Milk from County Line is regularly used to "top off" Meadow Gold's fluid requirements on Fridays, the last bottling day of the week at the distributing plant.

15. The volume of County Line supply plant milk needed by Meadow Gold Dairy for the weekly bottling schedule—like other plants in the market—is generally known at the beginning of each week. At that time, the Meadow Gold manager advises County Line of the determined volume needed for fluid purposes on particular days of the week. Supply adjustments which may be necessary for bottling on a given day are known by 11 a.m.⁸ of that day.

⁸ Mr. Marolf, the Chief Executive Officer of County Line Cheese Company at Auburn, Indiana, testified, among other things, the manager of Meadow Gold would tell County Line what milk he would need on what day. This was done on a weekly basis. (Tr. 270-279) Mr. Cashdollar's testimony was similar in that his testimony disclosed that he would know by 11 a.m. the amount of milk which he would need for

16. Meadow Gold Dairy receives bulk Grade A milk, *by contractual agreements*, from three sources:

1. Milk Marketing, Inc., a cooperative association and a participant in the Hoosier Milk Marketing Agency;

2. National Farmers Organization, a cooperative association; and,

3. County Line Cheese Company supply plant at Shipshewana, Indiana.

17. Gold Meadow's decision to purchase raw Grade A milk from three suppliers rather than relying on a single source for its full supply, is based on a business judgment that it is unwise to rely on a single source for its raw product needs.

18. During the relevant period of September 1980 through February 1981, Meadow Gold operated under an agreement with Milk Marketing, Inc./Hoosier to purchase a steady volume of producer milk averaging about six million pounds per month. Milk Marketing, Inc. sought to supply a predictable or constant volume each month and the supply contract stipulated to penalties [to be paid by Meadow Gold] if Meadow Gold required more or significantly less, than six million pounds during the month.

19. During the relevant period, Meadow Gold's arrangement with the National Farmers Organization was to purchase a constant number of loads per week as a regular portion of Meadow Gold's raw milk supply.

20. During the relevant period, Meadow Gold's agreement with County Line Cheese Company was to purchase an adequate volume of milk to qualify the supply plant [as a pool plant] and retain about one million pounds of milk per month of such purchases for fluid use, with the understanding that this would be a variable basis, balancing Meadow Gold's bottling needs against the relatively constant supply received from Milk Marketing, Inc./Hoosier and

the remainder of the day Mr. Cashdollar indicated his company's fluid milk supplies could be made known in alternative ways other than making a determination at the time that a truck pulled up to his facility. Simply stated, Mr. Cashdollar knew generally the fluid market supply requirements of his company on Monday of any particular week and no later than 11 a.m. on any particular day (Tr. 303, 304 and 305).

The validity of these assertions by Petitioners' witnesses is corroborated by testimony of Mr. Kalkofen, Assistant to the Market Administrator. Although Mr. Kalkofen did not have knowledge of the decision-making process as between Meadow Gold and County Line as to who decides what milk is retained and what milk is transferred, nevertheless, Mr. Kalkofen testified a distributing plant handler knows his fluid milk requirements ahead of time and plans the bottling schedule in advance.

the National Farmers Organization. County Line Cheese never refused to deliver any extra milk shipments needed for bottling by Meadow Gold.

21. During the relevant period, milk purchased from County Line Cheese Company by Meadow Gold was allocated by the two handlers to Class I, and paid for by Meadow Gold at the same price as milk purchased from Milk Marketing, Inc./Hoosier.

22. Meadow Gold Dairy receives raw Grade A milk for bottling purposes on every day of the week except Saturday. Meadow Gold bottles milk only on Monday, Tuesday, Thursday and Friday. Milk which is received but not bottled on a given day is stored for bottling on the next day.

23. During the relevant period, Meadow Gold received spot loads of bulk milk which was pooled under the Southern Michigan Order by the Michigan Milk Producers Association or under the Chicago Regional Order by Associated Milk Producers, Inc. (AMPI). AMPI is a participant together with Milk Marketing, Inc. in the Hoosier Milk Marketing Agency. These spot shipments were arranged by Milk Marketing, Inc./Hoosier pursuant to its supply agreement with Meadow Gold. Meadow Gold had no knowledge that it would receive milk of Chicago Regional or Michigan origin until the truck involved arrived at the Meadow Gold plant at the direction of Milk Marketing, Inc./Hoosier. Meadow Gold's general manager had no knowledge that these loads constituted "outside the Order milk" until the hearing in this case.⁹

24. Meadow Gold measured all the milk received by it through a meter and this was so whether Meadow Gold intended to keep it or the milk was just for qualifying purposes. County Line paid Meadow Gold approximately Fifty Thousand Dollars (\$50,000.00) as reimbursement of Meadow Gold's expenses for pumping the milk in and out and handling the qualification procedure for County Line plant.

25. During the latter part of February, 1981 and in March, 1981, employees of the Market Administrator, who jointly administers the Chicago Regional and Indiana Orders, conducted an audit of the Petitioners' handlers, Meadow Gold and County Line Cheese.

⁹ Mr. Cashdollar, General Manager of Meadow Gold, explained that said loads of milk were procured for Meadow Gold by Milk Marketing, Inc. at the time arrangements were made with Milk Marketing, Inc. It was part of Meadow Gold's total agreement and Meadow Gold had no knowledge whether it was going to be AMPI or Michigan Milk. Milk Marketing, Inc./Hoosier never had a problem of supply with Meadow Gold with its milk requirements and would have had no trouble supplying additional milk. (Tr. 301, 319, 325-326; Respondent's Exhibit 8, Column 4; see also Tr. 167)

The audit was explained by Mr. Kalkofen, an assistant to the Market Administrator. During the course of the audit, the auditors followed some tank trucks during four or five days in late February and early March, 1981, which arrived at Meadow Gold from Shipshewana supply plant, and reported to the Market Administrator that they were not being physically unloaded at Meadow Gold but rather were directed from Meadow Gold to the County Line Cheese plant in Auburn. The auditors also observed that some shipments from Shipshewana were directed to Auburn without an intervening stop at Meadow Gold. A written report was prepared by the auditors but was not made available at the hearing by Respondent.

26. The auditors examined records for September, 1980, through February, 1981, made available by Petitioners, including bills of lading and scale weight tickets, which show a date and time of departure of shipments from Shipshewana, identifying shipments which were retained by Meadow Gold Dairy, and show the date and time of arrival at the County Line plant in . . . [Auburn]. These records show the lapsed time for transportation and handling of milk shipments not needed or retained by Meadow Gold for fluid purposes and which were delivered to Auburn for surplus manufacturing disposition.

27. The foregoing observations by employees of the Market Administrator raised a question by the agency of whether the Shipshewana plant would qualify under Section 7(b) of the Order as a pool supply plant, and whether the dairy farmers associated with the plant should share in the market-wide pool, since the Market Administrator construes Section 7(b) to require all qualifying shipments to be unloaded into the distributing plant whether or not such shipments are needed by the distributing plant. The Market Administrator calculated that it would take a minimum of approximately three total hours to (a) haul milk from Shipshewana to Meadow Gold (about one hour, twenty minutes), (b) unload such milk into the Meadow Gold plant and reload it into the tank truck (one hour and nineteen minutes average), and (c) transport such milk seventeen miles further to Auburn (40 minutes) according to Mr. Kalkofen; 25-35 minutes according to Mr. Marolf.

* * * * *

29. Premised upon the Market Administrator's observations, his mileage calculations, and his interpretation of 7(b) of the Order, the Market Administrator disallowed reported qualifying shipments for September 1980 through February 1981 which involved a

total of elapsed time of less than three hours for transporting and handling between Shipshewana and Auburn because it was felt that these shipments "were not unloaded in the Meadow Gold plant" prior to delivery to Auburn. In other words, what occurred was that after the Market Administrator's auditors made observations that trucks were pulling into Meadow Gold's facility and not unloading, the Market Administrator, premised upon Petitioners' records, and applying the mileage and time factor, made determinations which resulted in the audit adjustments herein involved. For example, the Market Administrator disqualified one load which involved an elapsed time of one hour and 36 minutes which was determined to have moved in late February from the County Line plant in Shipshewana via the Meadow Gold plant (and) was returned to County Line Cheese plant in Auburn.

30. An over-all evaluation of the entire record results in a determination that each load of milk which was disqualified by the Market Administrator was available for fluid use and directed to Auburn only with the foreknowledge that the shipments were not needed for fluid use.

31. Both parties agree that the Market Administrator's determination of qualifying shipments from the Shipshewana supply plant for the months of September, 1980 through February, 1981 consisted of: (1) such shipments as were retained by Meadow Gold; and (2) such additional shipments to Meadow Gold which were then further shipped to Auburn *and* which involved a total elapsed time of three hours or more. The only factual determination of relevance to the Market Administrator's determination under his construction of Section 7(b) of the Order is whether certain shipments were or were not unloaded into and reloaded out of the Meadow Gold distributing plant. No relevant determination was made to distinguish between such shipments which were transported to Auburn via Fort Wayne (but not unloaded) and other shipments—equally unneeded by the distributing plant—which may have been transported by a more direct route to Auburn for surplus disposal in manufactured products.

32. With respect to milk shipments that left Meadow Gold, whether or not they were determined to be qualifying shipments was ascertained by a computation of elapsed time. The Respondent does not dispute these factual assertions. As a result of determinations premised upon elapsed time of milk leaving Meadow Gold, the Market Administrator calculated that the qualifying shipments from the supply plant, as a percentage of milk received and not diverted by the supply plant, were:

49.50 percent for September 1980
 30.59 percent for October 1980
 34.06 percent for November 1980
 31.91 percent for December 1980
 33.76 percent for January 1981

which, in each case, by such determination, was less than the 50 percent shipment required, under the Market Administrator's construction of 7 CFR, Sec. 1049.7(b). The Respondent does not dispute these calculations.

33. The Market Administrator further calculated that a total of 1,790,020 pounds of milk were shipped as qualifying shipments, from Shipshewana to Meadow Gold during February 1981. This volume represents approximately 31% of total receipts not diverted of the supply plant for the month.

34. Based on the foregoing determinations, the Shipshewana supply plant and the Grade A dairy farmers¹¹ associated with the plant were "depooled", or not pooled, for the months of September 1980 through February 1981.

35. The shipments from the supply plant to Meadow Gold, as determined by the Market Administrator, were allocated "to other source milk" from an unregulated supply plant and subject to "down-allocation" or compensatory payments. The resulting audit adjustments issued by the Market Administrator to County Line Cheese totaled \$199,221.74, and to Meadow Gold Dairy totaled \$128,781.70, for a combined total of \$328,003.44. The Respondent does not dispute the correctness of the aforesaid factual assertions.

* * * * *

39. *The Indiana market is predominantly supplied by the milk production of dairy farmers who are members of cooperative associations.* During the relevant period, September, 1980–February, 1981, cooperative member milk represented 87.6 percent to 92.8 percent of the total producer milk pooled on the Indiana Order.

40. The cooperative association suppliers which are "handlers" under the Indiana Order are:

Associated Milk Producers, Inc. which pools approximately 70 million pounds of producer milk per month on the Indiana Order or about 50% of the total Indiana producer ("pool") milk. The member producers of Associated Milk

¹¹ These are the people who are being affected by the issues raised in this proceeding. [The Respondent's attempt to recapture the conclusions].

Producers, Inc., which are or have been pooled on the Indiana Order are located from Indiana to Wisconsin. In recent years AMPI has elected to disassociate its Wisconsin-located producer-members from the Indiana market.

Milk Marketing Inc. member producers, which are pooled on the Indiana Order, are generally located in Ohio and eastern Indiana.

Also included in the cooperative association suppliers which are "handlers" under the Indiana Order are National Farmers Organization and Dairymen, Inc.

41. During the relevant period, *almost one-half of the independent (non-member) milk production in the Indiana market was marketed through County Line Cheese Co.* For example, in October 1980, non-member milk represented only 12.3% of the total pooled milk or about 17.9 million pounds. Non-member milk reported by County Line Cheese Company was 8,249,831 pounds. The other significant outlet, besides County Line Cheese Co., for non-member milk—not members of cooperatives in the Indiana market—is through the Hoosier Milk Marketing Agency; about 5-10 percent of Hoosier's monthly total of 110 to 120 million pounds pooled in Indiana each month, is non-member independent milk.

42. The Hoosier Milk Marketing Agency is a collective cooperative association, or "super-pool" consisting of Associated Milk Producers, Inc., and Milk Marketing, Inc. Hoosier represents approximately 70 to 80 percent of all producer milk pooled on the Indiana Order. AMPI functions as the marketing agent for Hoosier. Hoosier's marketing practices include coordinating supply with the demand of its customers for milk in various classes of utilization; entering into full supply agreements (*i.e.*, agreements to provide all milk needed in Class I, II and III) with almost all of its customers; and announcing and collecting an "over-order", or premium price, for milk from its customers (primarily on Class I) and re-pooling the proceeds of such premiums to the Hoosier super-pool participants. [Footnote omitted.]

* * * * *

45. On brief, Respondent concedes that Meadow Gold did not need the Shipshewana supply plant milk. [Footnote omitted.]

46. The volume of milk which Hoosier elects to pool on the Indiana Order is sometimes insufficient to satisfy the demands of its customers for utilization in Class I, II, and III. Hoosier's full supply contractual commitments require fulfillment of not only bottling

needs, but also for Class II and Class III usage. When this occurs, Hoosier obtains spot loads of milk pooled in other orders by arrangement with Associated Milk Producers, Inc. (the Chicago Order No. 30), or, the Michigan Milk Producers Association (Order No. 40). Hoosier generally had advance knowledge of 48 hours or more from handlers who need extra milk. As a matter of practice, Hoosier *does not* seek to supplement its supply or obtain spot loads of milk from non-Hoosier suppliers operating within the Indiana market. During the relevant period, *Hoosier never called County Cheese Co. for supplemental or spot supplies; it likewise never called on the National Farmers Organization which has producers in the Indiana marketing area, for such supplies.* Hoosier calls upon Dairymen, Inc. only on the rare occasion of a snowstorm or emergency.

* * * * *

53. The "Bulk Other Milk" received by Meadow Gold was directed and coordinated by Milk Marketing Inc./Hoosier, pursuant to a contractual agreement²⁰ to supply about six million pounds per month to Meadow Gold. *Meadow Gold had no knowledge or control over the pool or non-pool sources selected by MMI/Hoosier to meet this agreement. MMI/Hoosier never indicated that they would have any problems supplying this volume or a greater volume if desired by Meadow Gold.*

* * * * *

58. During the months in question, the available Grade A milk supply associated with County Line Cheese Company served to balance or supplement the variable daily fluid requirements of Meadow Gold. These requirements are known and scheduled in advance. The use of County Line's milk for fluid purposes by Meadow Gold has the highest priority. Because of advance knowledge and planning, it was not necessary to unload Country Line milk shipments into Meadow Gold in order to make such milk available to Meadow Gold. In each case, Meadow Gold's need for available County Line milk was determined at or prior to shipment. Most of Meadow Gold's fluid requirements were supplied by MMI-Hoosier. In connection with its balancing services, County Line typically delivered a shipment into the Meadow Gold plant on Friday afternoon, to "top off" Meadow Gold's bottling needs for the week to the

²⁰ Meadow Gold's contract called for a penalty [to be paid by Meadow Gold] for amounts over and under the six million pounds a month average.

extent required by Meadow Gold. The balance of that shipment, even though it might be a small quantity, was transferred to Auburn for surplus disposition.

* * * * *

63. Hoosier did not seek any portion of the County Line milk supply *except on the condition* that County Line become a full participating member of Hoosier. Following County Line's rejection of the proposal, Hoosier never asked County Line for spot loads of supplemental milk, even though County Line would have been receptive to such requests and would have furnished the milk.

64. Hoosier did not seek supplemental milk from County Line or other non-Hoosier suppliers with which it competed in the Indiana market; it elected, instead to bring in "other order" milk from co-operatives with which it is affiliated or has arrangements.

65. At no time during the relevant period, or during any other period, did Hoosier or *any Indiana distributing plant handler* (other than Meadow Gold) request County Line Cheese Co. to provide spot loads of milk needed for fluid purposes. The County Line milk supply was available for such purposes and supplemental milk would have been sold by County Line if any request has been made.

66. As herein pertinent, [the] County Line milk [ultimately sent to its cheese plant] was not actually needed by Meadow Gold . . . during the relevant period September 1980 through February 1981.

67. The United States Department of Agriculture through the Administrator, Agriculture Marketing Service, and the Market Administrator, interpret Section 7(b) of the Indiana Order (7 CFR Sec. 1049[.7](b)) in the manner that, regardless of need, milk must be physically accepted by the distributing plant and [when the milk is not needed by the distributing plant,] such physical receipt can only be accomplished by a pumping in and pumping out operation. Such pumping in and pumping out operation must be done in order that the shipment can be considered a "qualifying shipment" and . . . [pooled] under the Order.

* * * * *

70. The Indiana Federal Milk Marketing Order was established pursuant to a final rulemaking decision, issued in December 1968, creating a new Order by merger of separate orders for Fort Wayne and Indianapolis, Indiana, also including counties which were pre-

viously unregulated or subject to regulations under the Chicago Order. (33 Fed. Reg. 18282 (1968)) . . .

* * * * *

83. Frequent pumping of milk is known to deteriorate milk quality.

84. Under Section 7(b) as construed by the Market Administrator, a supply plant may qualify by complying with the "form" of the Order required by the Market Administrator—by pumping it through a distributing plant—even if all of the milk supply is used for manufacturing purposes and no milk is retained by the distributing plant for fluid use. This is true even though there may be a great demand in the market for supply plant milk for fluid purposes.²³

85. Under Section 7(b), a supply plant which is qualified during September through February, may be fully and automatically pooled as a supply plant during the following April through August. Although thus able to be pooled without delivering any shipments to Meadow Gold, County Line delivered about 3.5 million pounds of milk to Meadow Gold during each of the "free" months of April–August 1980.

86. The cost (excluding transportation) to County Line Cheese Company to comply with qualifying requirements under Section 7(b) as construed by the Market Administrator—i.e. and other handling expenses to unload and reload milk not needed by Meadow Gold for fluid use—is \$50,000 per year which is incurred by Meadow Gold for these handling services. An additional cost of 4 cents per hundredweight results from transporting milk from Shipshewana to Auburn via Fort Wayne. The additional transportation costs on the reported volume of Class III transfers to County

²³ The manner in which supply plants may qualify for pooling may differ under various Orders. The above finding of fact is premised on Mr. Kalkofen's testimony at Transcript 208-209.

"Q You pumped into the plant, pumped out of the plant and into the trucks and hauled all of it further on to Auburn?

A Yes

Q The plant would qualify even though none of the milk was kept for bottling purposes?

A Yes

Q. Would the plant continue to qualify under the Indiana Order doing that even if a neighboring plant that was desperate for milk * * *?

A That is right."

Line, Auburn, during September 1980–February 1981, was approximately \$5,000.

* * * * *

88. Under Section 44 of the Indiana Order (7 CFR, 1049.44) other source milk purchased by a distributing plant from an unregulated source supply plant, or, as in this case, from a supply plant which has been depooled by the Market Administrator, and which is designated as Class I milk by the buying plant, is subject to "down-allocation." Simply stated, this is a process by which "pool" milk is given a priority share and disproportionate allocation to the volume of Class I utilization of the distributing plant handler. This . . . forces an equally disproportionate share of the "other source" milk into Class III despite the intent of the distributing plant and its payment for such "other source" milk at Class I. . . . As a result of the depooling of County Line and the "down allocation" of a portion of "other source" milk determined to have been received by Meadow Gold [, Meadow Gold] incurred an audit obligation on "up-allocated" producer milk of \$18,030.23 [\$1.08 (the difference between Class I and Class III prices) times 16,694.66 cwt.].

* * * * *

90. Under Section 71(a)(2)(ii) of the Order, milk from unregulated supply plants or, as in this case, from a supply plant depooled by the Market Administrator, which is not down-allocated but which retains the Class I classification desired by the handler, is subject to a "compensatory payment." For such milk, the distributing plant which buys the milk must pay to the Market Administrator the difference between the weighted average price and the Class I price at the location zone of the supply plant. This is . . . done [according to respondent] to prevent the buying handler from obtaining a competitive advantage over other handlers and is based on an irrebuttable regulatory presumption that the "other source" milk allocated to Class I has been paid for at the weighted average or blend price. The *actual* payment price is of no concern to the Market Administrator or to the application of the Order. By way of illustration [footnote omitted], Meadow Gold was required to pay a compensatory payment of twenty-four cents per hundredweight on 1,553,943 pounds of milk—or \$3,729.46 [—] under the audit adjustment for November 1980. This compensatory payment was assessed

despite the fact that Meadow Gold had previously paid for this milk at Class I prices to [its affiliate,] County Line.²⁵

91. The procedures of Section 44 and 71 of the Order—resulting in “down-allocation” of “other source” milk, priority allocation of producer milk to Class I, and the imposition of a compensatory payment for “unregulated supply plant milk” allocated to Class I [—] were applied in the audit adjustments issued by the Market Administrator to Meadow Gold for each month of September 1980 through February 1981. Much of the audit adjustment billing to Meadow Gold—which exceeds \$128,000—is the result of the application of Sections 44 and 71 of the Indiana Order. . . .

* * * * *

99. Beginning in September 1980, and continuing in the subsequent months, Meadow Gold increased its producer receipts by a factor of almost two while at the same time Meadow Gold increased its sale of Class III milk to the cheese plant in Auburn. As stated by the Respondent: “Thus, the increased receipts from the Shipshewana supply plant were not needed for fluid use.” [Footnote omitted.]

* * * * *

103. The Respondent does not necessarily disagree with the Petitioners description of the operations and of the effects of 7 CFR Section 1049.44 and Section 1049.71. However, Respondent maintains that it is Petitioner’s own fault because the price paid by Meadow Gold to County Line for milk shipped from Shipshewana to Meadow Gold for Class I milk is a matter of contract, and that Meadow Gold should recover from County Line for any loss which Meadow Gold incurred as a result of the value of milk sold for

²⁵ . . . The fact that Meadow Gold’s primary purpose in receiving milk from the County Line Cheese supply plant was to qualify the producer milk which was destined for the County Line Cheese plant in Auburn and not for the fluid needs of Meadow Gold plant is easily explainable. Meadow Gold did not need the milk in question for fluid needs and moreover, a qualification for pooling purposes cannot be looked upon as an evil act. [As stated in § 1(B) of the conclusions, however, it is harmful to the regulatory program and to producers supplying the fluid needs of the market to have a supply plant pooled under the Order if the supply plant’s major function during the period of short supply is not the supplying of fluid milk to the market.]

Class I use when such milk was depooled or was not pooled in the first place.²⁸

CONCLUSIONS

This is a proceeding instituted by petitioners under § 8c(15)(A) of the Act to review determinations made by the Market Administrator of Federal Order No. 49 as to petitioners' obligations under the Order. It is well-settled that the burden of proof in such a proceeding rests with petitioners. Petitioners have the burden of proving that the challenged obligations are "not in accordance with law" (7 U.S.C. § 608c(15)(A)). *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills*, 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied*, 374 U.S. 832, 375 U.S. 819 (1963); *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd*, 350 F.2d 978 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo. 1945), *aff'd*, 157 F.2d 87 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd*, 149 F.2d 860, 862-63 (3d Cir. 1945).

Also, as stated in *In re Michaels Dairies, Inc.*, 34 Agric. Dec. 1663, 1701 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319, *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976):

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. See *In re Independent Milk Producer-Distributors' Assoc.*, 20 Agriculture Decisions 1, 18 (1961); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 Agriculture Decisions 1209, 1220 (1957), *affirmed*, Southern Dist. Miss., January 5, 1959. See, also, *Pacific States Co v. White*, 296 U.S. 176, 182.

²⁸ Respondent alleges that such a contractual arrangement "is common in the industry" which requires, as part of the contract that the purchase of milk by A from B for Class I use is subject to and conditioned upon the qualification of such milk for pricing under a Federal Order. This characterization of the Meadow Gold-County Line agreement is not borne out by the record [except by inference]. Also, as pointed out by Petitioners, assuming *arguendo* that Meadow Gold could recover the excess charges from County Line, then County Line suffers the loss. Could County Line then recover from the producers (farmers)? To whom should the farmer look to be made whole? [For the answer to these questions, see the discussion in § II of the conclusions.]

I. The Market Administrator's Determination That County Line Did Not Qualify as a Pool Plant under § 7(b) of the Order Is in Accordance with Law.

A The Market Administrator's Construction of the Order Is Lawful and Not Out of Harmony with the Objectives of the Act.

During the period from September 1980 through February 1981, County Line's supply plant received or reported about 8.3 to 9.2 million pounds of Grade A milk from dairy farmers each month (Finding 7), of which only about one million pounds per month (or 11% to 12%) was retained by Meadow Gold for fluid use (Finding 20). However, since County Line diverted some of its receipts (which are not counted as receipts under § 7(b)), its monthly receipts for qualification purposes were only 5.5 to 6.4 million pounds (averaging 5.9 million pounds) during that period (RX 1). Hence Meadow Gold retained for fluid use about 17% of County Line's qualifying receipts ($1 \div 5.9$). (But under the Market Administrator's interpretation, Meadow Gold was not required to retain *any* of County Line's milk for fluid use, as long as 50% of the qualifying pounds were pumped into and out of Meadow Gold's distributing plant tank.)

Section 7(b) of the Order at issue in this proceeding provides (7 CFR § 1049.7(b)):

§ 1049.7 Pool plant.

Except as provided in paragraph (c) of this section, "pool plant" means:

* * * * *

(b) A supply plant from which not less than 50 percent of the Grade A milk received from dairy farmers and handlers pursuant to § 1049.9(c) at such plant during the month is shipped to [distributing] plants qualifying for the month pursuant to paragraph (a) of this section. A plant qualified to this paragraph in each of the immediately preceding months of September through February shall remain so qualified for the months of April through August unless written application is filed with the market administrator on or before the first day of any such month to designate such plant as a nonpool plant for such month and for each subsequent month through August during which it would otherwise not qualify under this paragraph.

The Market Administrator concluded that County Line did not qualify under § 7(b) of the Order as a pool plant from September 1980 through February 1981 because he determined that 50% of

the qualifying receipts was not pumped into and out of Meadow Gold's distributing plant tank before it was sent to the Auburn cheese plant.²⁰

The pooling of milk at supply plants under Federal Milk Orders is explained in Vetne, "Federal Marketing Order Programs," in 1 *Agricultural Law* § 2.21 (J. Davidson ed., 1980), as follows (footnotes omitted):

Supply plants qualify for full regulation as pool plants by shipping a specified percentage of Grade A milk receipts²¹³ to one or more distributing plants regulated under the order. Traditionally, qualifying shipments from supply plants to distributing plants required a transfer. That is, milk had to be physically received from dairy farms, unloaded, and then reloaded for shipment to distributing plants. In order to encourage fuel efficiency, handling economy, and preserve milk quality, several orders have been amended to allow a portion of qualifying shipments from supply plants to move by diversion, directly from dairy farms to distributing plants.²¹⁴

Performance requirements for supply plants vary considerably. Customarily, 50 per cent of receipts, during specified months, are required to be shipped to distributing plants.²¹⁵ However, qualifying shipments are generally reduced in marketing areas with substantial surplus milk production in which distributing plants have less need for supply plant milk.²¹⁶

In recognition of the general inverse seasonal relationship between milk production and consumer demand, most orders allow supply plants to qualify automatically, or at reduced performance levels, during the spring "flush" production period if they have qualified during the previous fall deficit months. Other variables in performance provisions for supply plants allow the director of the Dairy Division, USDA, to adjust shipping percentages by informal rule making if the need arises;²¹⁷ permit a portion of qualifying shipments to be made to nonpool distributing plants;²¹⁸ and allow multiple supply plants to report and perform as a unit.²¹⁹

²⁰ County Line's supply plant and cheese plant and Meadow Gold's distributing plant are all owned by Beatrice Foods Company.

Handlers generally accept and even support milk order regulation so long as their competitors are comparably regulated. Handlers with high Class I utilization, such as distributing plants, more frequently seek to avoid regulation to maintain a competitive advantage. In contrast, supply plants and other handlers with little Class I utilization, tend to prefer regulated status.

Distributing plants often have a greater utilization of Class I milk than the market average. If unregulated, the handler can pay producers a better price than the blend price received by producers who supply competing regulated distributing plants, yet have a total cost which is lower than regulated competitors. If the plant becomes regulated, the handler must account to the pool, by payments to the market administrator, for the value of Class I utilization above the weighted market average. Distributing plant handlers seeking to avoid regulation have been generally unsuccessful.²²⁰

Supply plant handlers may seek to become regulated because their Class I utilization is lower than average Class I utilization. Commonly, a supply plant is closely associated with a facility manufacturing cheese or other Class III²²¹ products; often they are on the same premises. If the supply plant is unregulated, payment to Grade A dairy farmers at a price comparable to the blend price would result in payment in excess of the utilization value of the milk. To remain competitive in payments to producers, the supply plant may qualify through shipments to a distributing plant and draw money from the pool equal to the difference in value between the plant's utilization and the market-wide weighted average utilization. Thus, supply plant operators, and others with low Class I utilization, have sought administrative and judicial relief upon loss of pool plant status, with mixed results.²²²

I were writing on a clean slate, without any prior interpretation by a Market Administrator or Judicial Officer of the language at issue here, I would agree with the ALJ (Initial Decision at 172) that the Market Administrator unlawfully construed § 7(b) to require that supply plant milk not only be transported to a distributing plant, but also physically pumped into the distributing plant's tank. But since an identical Market Administrator's interpretation of identical Order language was upheld by the Judicial Officer in 1965, I accept the Market Administrator's interpretation here as a

permissible interpretation of the Order language. As I stated in ruling on a certified question in this case (*In re County Line Cheese Co.*, 41 Agric. Dec. 640, 643-44 (1982)):

It appears that the Market Administrator has consistently interpreted the Order as requiring that milk not only be shipped to the distributing plant but also physically received by the distributing plant. That interpretation is a reasonable interpretation of the regulation, and should be followed in this proceeding, particularly since it is consistent with a square holding by the Judicial Officer in 1965 under identical Order language.

In *In re Owen Dairy Co.*, 24 Agric. Dec. 1171, 1174-75 (1965), the Judicial Officer construed identical language in the Order Regulating the Handling of Milk in Northeastern Wisconsin (7 CFR § 1045.10(b)), which provided that a "pool plant" includes:

(b) A supply plant from which not less than 40 percent of the Grade A milk received from dairy farmers at such plant during the month is shipped as fluid milk products to pool plants qualified pursuant to paragraph (a) of this section: *Provided*, That a supply plant which qualified pursuant to this paragraph in each of the immediately preceding months of July through November shall be a pool plant for the months of December through June unless written application is filed with the market administrator on or before the first day of any such month to be designated a nonpool plant for such month and for each subsequent month through June in which it would not otherwise qualify as a pool plant.

In construing that language as requiring actual unloading of the milk at the distributing plants, the Judicial Officer held (24 Agric. Dec. at 1175):

Section 1045.10 (b) qualifies as a pool plant a supply plant " . . . from which not less than 40 percent of the Grade A milk received from farmers is shipped as fluid milk products to pool plants qualified pursuant to paragraph (a) of this section . . . " Obviously these provisions mean something more than merely the physical acts of ship-

ping the milk. In allowing plants like petitioner's to share in the pool the intent was that the shipping plants identify themselves with the fluid market by shipping fluid milk or products *for use* by the distributing plant. So we have some doubt as to the purposes of the provisions being met when milk goes from a supply plant to a distributing plant where it is pumped back into the truck and returned to the supply plant for manufacture. This was accepted, however, in the administration of the order as qualifying such milk as transferred to the distributing pool plant. But we certainly do not see anything "not in accordance with law" about the refusal of the market administrator to treat the milk *not* unloaded at the distributing plants as being transferred to or shipped to the distributing plants within the meaning of section 1045.10 (b).

Petitioners argue that "Judicial Officer Flavin's decision in *Owen Dairy Company*" was "premised on the view that supply plant requirements in the Order under review required more in substance than it did in form," whereas more recent decisions have recognized that form, rather than substance, is all that is required under the Market Administrator's interpretation of the supply plant requirements (Petitioners' Reply to the Agency Response and Memorandum 7). However, Judicial Officer Flavin expressly recognized in *Owen Dairy* that form was all that was required. Specifically, although he expressed "some doubt as to the purposes of the provisions being met when milk goes from a supply plant to a distributing plant where it is pumped back into the truck and returned to the supply plant for manufacture," he recognized that such a sham transaction "was accepted, however, in the administration of the order as qualifying such milk as transferred to the distributing pool plant" (24 Agric. Dec. at 1175).

Petitioners also argue that in some Federal Orders, the express language of the Orders requires that milk be shipped to and physically unloaded into the distributing plants (see 7 CFR §§ 1030.7(b), 1036.7(b), 1062.6). This demonstrates that the requirement can be stated with greater clarity in the present case. Petitioners' argument that the more particular language

were used in one section of the Indiana Order but omitted in the supply plant section of the same Order. I do not know whether the same personnel handled all of the rule making dockets in question, but, in any event, if it were not the intention of the draftsmen of the Order language at issue here to use the present language in the same manner as such language had been construed by the Judicial Officer in *Owen Dairy*, they were obligated to explain that fact in the discussion preceding the issuance of the final regulation. But there is nothing in the "legislative history" of the Indiana Order to indicate that the language at issue here was used in a different manner than in *Owen Dairy*.

In addition, it is well-settled that an official who is responsible for administering a regulatory program (such as a Market Administrator) has authority to interpret the provisions of the statute and regulations, and his interpretation is entitled to great weight.³⁰

The doctrine of affording considerable weight to interpretation by the administrator of a regulatory program is particularly applicable in the field of milk. As stated by the court in *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969, 980 (2d Cir. 1943):

The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

Similarly, in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966), the court stated:

³⁰ *Allen M. Campbell Co. Gen. Contractors, Inc. v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th Cir. 1971); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6th Cir. 1966). See, also *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n.6 (1940); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 335 (1933); *United Truck Lines, Inc. v. ICC*, 189 F.2d 816, 817 (9th Cir.), cert. denied, 342 U.S. 830 (1951); *L. Gillarde Co. v. Joseph Martinelli & Co.*, 169 F.2d 60, 60-61 (1st Cir.) cert. denied, 335 U.S. 885 (1948); *Armstrong Co. v. Walling*, 161 F.2d 515, 517 (1st Cir. 1947); *Superior Packing Co. v. Porter*, 156 F.2d 193, 195 (8th Cir.), cert. denied, 321 U.S. 788 (1946); *Bowles v. Mannie & Co.*, 155 F.2d 129, 133 (7th Cir.), cert. denied, 321 U.S. 736 (1946); *Bowles v. Cudahy Packing Co.*, 154 F.2d 891, 892 (3d Cir. 1946); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 417-18 (1974); *In re Weissglass Gold Seal Dairy Corp.*, 32 Agric. Dec. 1004, 1055, aff'd, 369 F Supp. 632 (S.D.N.Y. 1973).

A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

For the reasons set forth above, the Market Administrator's interpretation of § 7(b) of the Order, requiring that milk be not only transported to a distributing plant, but also physically pumped into the distributing plant's tank, to be a qualifying shipment, is a legally permissible interpretation of the Order.

Petitioners argue (Petitioners' Brief on Tentative Decision and Order at 5):

In [*In re*] *Associated Milk Producers*, 33 Agric. Dec. 976, 984 (1974)—decided nine years after *Owen*—the Judicial Officer suggested by reference that there is continuing validity to the concept that milk may be shipped to and received by a plant without “enter[ing] the physical confines of the building . . . ” (quoting [*In re*] *Fiorlat Dairy Products Corp.*, 11 Agric. Dec. 251, 162 (1952)).

The dicta in *Associated Milk Producers*, relied on by petitioner's, is based on the holding in *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969, 981 (2d Cir. 1943), affirming the Market Administrator's interpretation of a milk Order that cream, which was transferred in the street adjacent to a milk plant from a large truck to a small truck, was “received” at the plant and “moved from” the plant. However, the court did not hold that the Market Administrator's interpretation was required, but merely that it was a permissible interpretation of the Order.

The word “received” has been interpreted differently in various milk orders, depending upon the regulatory purpose to be served by the particular provisions at issue. *In re Vernon Coop. Creamery Ass'n*, 38 Agric. Dec. 322, 329–30 (1979). Whether milk is regarded as “received” at a particular plant frequently depends on whether it is advantageous to “producers” under the Order to consider the milk as “received” at the plant. The cases holding that it is a legally permissible interpretation of milk orders to regard milk as “received” at a plant, when it is merely transferred at or outside of the plant, have no relevancy here. Furthermore, County Line's milk was not even transferred to other trucks at Meadow Gold's plant.

Petitioners contend that the Indiana Order, as interpreted by the Market Administrator, is “out of harmony with the legislative ob-

jective," that "handlers are regulated so that producers may benefit," and that the rules may not be applied "to benefit one group of producers to the exclusion of others" (Petitioners' Brief on Tentative Decision and Order at 2). But petitioners' argument begs the question. Who are the "producers" to be benefited under the *Indiana* Order. Certainly not all dairy farmers in the United States; nor all dairy farmers in the Midwest; nor even all dairy farmers in the State of Indiana.

The only "producers" to be benefited by the Indiana Order are those dairy farmers who meet the definition of "producer" in the Order, which, insofar as relevant here, requires that their milk be "received at a pool plant" (7 CFR § 1049.12(a)). The Indiana Order is the same, in this respect, as every other marketwide milk order. As stated in Vetne, "Federal Marketing Order Programs," in 1 *Agricultural Law* § 2.39 (J. Davidson ed., 1980) (footnotes omitted):

In order to receive the benefits of the blend price, a dairy farmer must meet the requirements of a *producer* as defined in each order, and his production must qualify as *producer milk*.

Simply stated, a *producer* under any order is a dairy farmer who: (1) sells milk to a pool handler; (2) is in compliance with Grade A requirements; and (3) is not a producer-handler. The producer's "milk must either be received at a pool plant or diverted to a nonpool plant for the account of a pool handler."

The dairy farmers shipping milk to County Line were entitled to the benefits of the Indiana Order only if County Line was a pool plant under the Indiana Order, and County Line was a pool plant under the Indiana Order only if the required percentage of its milk was "shipped to" (i.e., unloaded into) a distributing plant during the period involved here. Accordingly, once it has been determined that County Line was not a pool plant under the Indiana Order (since it did not ship the required percentage of its milk to a distributing plant regulated by the Order), it is entirely consistent with the objectives of the Act to exclude the dairy farmers shipping to County Line from the benefits of the Indiana Order.

Petitioners argue (Petitioners' Brief on Tentative Decision and Order at 8 n.*):

The milk received by Meadow Gold was excluded from the pool only because it was first assembled at Shipshewana for efficient shipment. Had this same milk moved directly from dairy farms to Meadow Gold, without intervening as-

sembly, there would be no issues as to pool participation or other source milk.

Petitioners miss the point. The milk was not excluded from the pool because it "was first assembled at Shipshewana for efficient shipment." The milk was excluded because, after it was assembled at Shipshewana, it was never "shipped to" (*i.e.*, unloaded at) Meadow Gold's plant.

Petitioners argue that the action of the Market Administrator "is out of harmony with the Act because it makes producer pool participation conditional upon the disposition of milk by the handler after delivery by the producer" (Petitioners' Brief on Tentative Decision and Order at 4). But that is true under almost all marketwide milk orders where a dairy farmer ships milk to a supply plant. That is, almost every marketwide milk order has supply plant qualification requirements, which must be met to qualify a supply plant as a pool plant (Dairy Division, AMS, USDA, Summary of Major Provisions in Federal Milk Marketing Orders, July 1, 1984, at 39-43 (Table 3)). If any supply plant fails to qualify as a "pool" plant, its dairy farmers fail to qualify as "producers." Hence there is nothing unique, in this respect, about the Indiana Order, and nothing out of harmony with the Act.

Petitioners further argue that the "agency may invoke the enforcement authority of Section 8a(6) of the Act [7 U.S.C. § 608a(6)] to compel [County Line's] compliance with the regulatory directive; it may not impose an unauthorized penalty for perceived noncompliance with the rule" (Petitioners' Brief on Tentative Decision and Order at 4). However, the agency could not have invoked the enforcement authority of the Act to compel County Line to meet the pool plant qualification provisions. The agency has no authority to compel any plant to become a pool plant. That is a voluntary decision to be made by each supply plant. (A supply plant that is not a "pool plant" is, of course, not required by the Order to pay its dairy farmers the uniform blend price under the Order.)

Furthermore, no "unauthorized penalty" has been imposed on County Line or the other petitioners. The Market Administrator's audit adjustments were not in the nature of a civil penalty. The Market Administrator merely excluded milk from the Indiana pool which was not "producer" milk, just as every Market Administrator does under every marketwide milk order in the country.

For the foregoing reasons, the Market Administrator's determinations were not out of harmony with the objectives of the Act.

B. Section 7(b) of the Order, as Interpreted by the Market Administrator, Is Supported by Reasoned Agency Decisionmaking.

Petitioners argue, and the ALJ determined, that § 7(b), as interpreted by the Market Administrator, is not supported by reasoned agency decisionmaking, as required by the Administrative Procedure Act (5 U.S.C. §§ 553(c), 557(c), 706).³¹

The requirement of reasoned agency decisionmaking is explained in *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-68 (1962), as follows:

There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act [footnote omitted] will not permit us to accept such adjudicatory practice. See *Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion). "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 90. The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of "public convenience and necessity." Compare *id.*, at 91. And for the courts to determine whether the agency *has* done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Comm'n v. J-T Transport Co.*, 368 U.S. 81, 93; *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 488-489; *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511. Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different conse-

³¹ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-21 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156, 165-74 (1962); *Hooker Chemical & Plastics Corp. v. Train*, 537 F.2d 620, 635-37 (2d Cir. 1976).

quences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made. The Commission addressed itself neither to the possible shortcomings of § 204 procedures, to the advantages of certification, nor to the serious objections to the latter. As we shall presently show, these objections are particularly important in the present context and they should have been taken into account.

At the outset of the consideration as to whether the Secretary engaged in reasoned agency decisionmaking, I should explain that when I ruled on the certified questions in this case, I was under the mistaken impression that if the supply plant's milk was actually needed to meet the market's fluid needs, the Market Administrator would not countenance the charade of pumping milk into and out of a distributing plant's tank enroute to its intended destination, a cheese plant. That assumption was based, in part, on respondent's argument stating (Answer to Application for Interim Relief at 4-5):

The mere shipment of milk from a supply plant to a distributing plant is of no significance in terms of qualifying the supply plant under the order unless and until the milk is physically received at the distributing plant. If the Market Administrator interpreted 7 CFR 1049.7(b) as petitioners request a supply plant could qualify all its receipts by simply alleging it shipped its milk to a distributing plant when in fact the milk was received by a non-pool plant. In this situation, the supply plant would receive the pricing benefits of pooling its milk receipts without ever having to fulfill its obligation of supplying fluid milk when needed to the market, which is the main rationale for pricing such supply plant milk under the Order. Thus, petitioners' "shipping without receipt" argument borders on the absurd and is obviously without merit.

Expressing agreement with the latter portion of that argument, I stated in ruling on the first question certified in this case (*In re County Line Cheese Co.*, 41 Agric. Dec. 640, 646 (1982)):

Of course it "borders on the absurd" to permit petitioner to receive the pricing benefits of pooling its milk receipts without fulfilling "its obligation of supplying fluid milk *when needed* to the market" (emphasis supplied). But the question raised here is what must petitioner do to satisfy the Department that it is ready, willing and able to fulfill its obligation when its milk is not needed or wanted, and will not be used by the distributing plant? Does it not then

"border on the absurd" to require petitioner to truck its milk to a distributing plant, pump the milk into the plant, and then immediately pump it back into the supply plant's truck before it is delivered to its originally intended destination?

Still acting under the mistaken impression referred to above, in ruling on a second question certified by the ALJ, as to whether a trial-type hearing should be held in this case, I stated (*In re County Line Cheese Co.*, 41 Agric. Dec. 1324, 1324-25 (1982)):

Respondent has made no showing at present warranting a trial-type hearing in this proceeding. "It is well established that when the lawfulness of the Order itself or a provision thereof is attacked, the Act affords no trial *de novo* by way of the 8c(15)(A) petition." *In re Leonberg*, 32 Agric. Dec. 763, 792 (1973).

Respondent should, however, be afforded the opportunity to make a further demonstration to the Administrative Law Judge that a trial-type hearing is necessary in this proceeding. For example, the previous ruling of the Judicial Officer in this proceeding relates to the legality of the order where the supply plant's milk is not needed or wanted by a distributing plant, and will not be used by a distributing plant (41 Agric. Dec. at 645-46). If, as a matter of fact, milk was in short supply during the relevant period and was needed by distributing plants in the area, it would "border on the absurd" to "permit petitioner to receive the pricing benefits of pooling its milk receipts without fulfilling 'its obligation of supplying fluid milk when needed to the market.'" (41 Agric. Dec. at 646). If the milk was actually needed during the relevant period, there is no need to decide the hypothetical question as to whether the order would be invalid as applied to a situation where the milk was not needed.³²

However, at the hearing held in this case, James L. Kalkofen Assistant to the Market Administrator, made it clear that the charade of pumping milk into and out of a distributing plant's tank is accepted by the Market Administrator as a qualifying shipment

³² Requiring respondent to demonstrate that there were issues of fact warranting a trial-type hearing did not, of course, change the burden of proof at such a hearing, which rests with petitioners. If the Order provisions were invalid only under certain factual conditions, *e.g.*, where a supply plant's milk was not needed by the market for fluid purposes, the burden would be on petitioners to demonstrate that those factual conditions existed.

under § 7(b) of the Order even in times of short supply when a supply plant's milk is needed by the market for fluid purposes. Specifically, he testified (Tr. 185, 208-09):

Judge BAKER: Is it a correct statement, Mr. Kalkofen, that you, that according to what you have learned and been instructed, it is immaterial whether or not there is a—whether the supply requirements have been met or not, because the sole criterion rests with the requirement, as you see it, as pumping the milk in and out, is that correct?

The WITNESS: My job as auditor would be to do that.

* * * * *

Q [By Mr. Vetne] If County Line milk had so chosen, under the Market Administrator's interpretation, could it have been pooled in full compliance with the order without leaving a drop of milk for bottling purposes at Meadow Gold?

A If they shipped the milk to another plant.

Q Could they have shipped the milk to Meadow Gold, fifty percent of their receipts and unloaded that whole fifty percent and transferred it to Auburn for manufacturing?

A Fifty percent of the Grade A receipts at Shipshewana, of the milk received at Shipshewana, you transfer to Meadow Gold and then what did you do with it?

Q And reload it back into the truck?

A What did you do with it?

Q You pumped into the plant, pumped out of the plant into the truck and hauled all of it further on to Auburn?

A Yes.

Q The plant would qualify even though none of the milk was kept for bottling purposes?

A Yes.

Q Would the plant continue to qualify under the Indiana order doing that even if a neighboring plant that was desperate for milk, County Line wouldn't sell us any milk?

Would County Line continue to qualify as long as they pumped it in and out, the whole volume of milk?

A That is right.

Hence under the Market Administrator's interpretation of § 7(b), form prevails over substance, and even if a supply plant's milk is needed by some distributors to meet the fluid needs of the market, if the particular distributing plant to which the milk is shipped, *viz.*, Meadow Gold, does not need the milk for fluid purposes (or, more accurately, does not plan to use the milk for fluid purposes), the supply plant's shipment qualifies under § 7(b) if the milk is pumped into and out of Meadow Gold's tank enroute to a cheese factory.

In view of that interpretation of § 7(b) by the Market Administrator, it is irrelevant whether other distributing plants in the Indiana market needed County Line's milk for fluid purposes, when it was being sent ultimately to County Line's cheese plant. Beatrice Foods Company, and its divisions, County Line and Meadow Gold, are not eleemosynary institutions. They are engaged in business for profit. Accordingly, they are not required, and they should not be expected, to arrange their milk handling activities so as to maximize the returns to milk producers supplying the Indiana market. Rather, they are only required, and should only be expected, to meet the minimum, lawful requirements for qualifying County Line as a pool plant.

Under the Market Administrator's interpretation of § 7(b), County Line is not required to offer its milk to other distributing plants that need milk for fluid purposes. Accordingly, when Meadow Gold does not need (or rather, does not plan to use) County Line's milk for fluid purposes, County Line is not required, and should not be expected, to offer the milk to other distributing plants, or even to acquiesce in their requests for such milk, rather than supply its cheese plant with milk. It is, therefore, irrelevant whether other distributing plants in the market needed County Line's milk for fluid purposes during the relevant period.³³

³³ Respondent failed to prove that other distributing plants in the area needed County Line's milk for fluid purposes during the relevant period. However, petitioners failed, and made no effort, to prove the converse, *i.e.*, that other distributing plants in the market did not need County Line's milk for fluid purposes. Petitioners only proved that County Line was ready, willing and able to satisfy requests by other distributing plants for milk, if any requests had been made. Since petitioners have the burden of proof, if it were necessary to determine whether other distributing plants in the market needed County Line's milk for fluid purposes during the relevant period, the determination would have to be against petitioners. The ALJ's

If there is any gap in the supply plant qualification requirements, as interpreted by the Market Administrator, the remedy is to change the requirements, or the Market Administrator's interpretation—not to expect petitioners to gratuitously arrange their milk transactions for the benefit of producers, rather than Beatrice's stockholders.

In the present case, we are concerned with the lawfulness of § 7(b), as interpreted by the Market Administrator, in the factual setting that existed from September 1980 through February 1981.

The ALJ, who had the advantage of seeing and hearing the witnesses testify, found that (i) County Line was at all times ready, willing and able to supply the fluid needs of the market (which is irrelevant, since the Order, as interpreted by the Market Administrator, imposes no such obligation on County Line, if it goes through the pumping charade), and (ii) before each load of milk disqualified by the Market Administrator left County Line's supply plant, both County Line and Meadow Gold knew that the milk was not needed by Meadow Gold, and that the ultimate destination of the milk was the Auburn cheese plant. She further found that pumping milk into and out of Meadow Gold's tank costs County Line about \$50,000 per year, plus an additional \$5,000 for added transportation costs (Findings 24, 86; Tr. 271-72), and that "[f]requent pumping of milk is known to deteriorate milk quality" (Finding 83; Tr. 219).

Where it is known by all parties in advance that a supply plant's milk is not needed for fluid purposes by the distributing plant to which it is shipped, and that it will be sent to a manufacturing facility in the same truck immediately after it is pumped into and out of the distributing plant's tank, the pumping in and pumping out procedure should be required only if there is a reasonable, logical reason for requiring the procedure.

The Secretary's formal rule making Decision as to the Indiana Order does not indicate that the Secretary even considered this precise matter, let alone offer any rational explanation in this respect. Specifically, the Secretary's 1968 Decision states (33 Fed. Reg. 18,282, 18,288-89 (1968)):

(b) *Plant requirements for pooling.* The pooling requirements for distributing plants and supply plants presently

findings that the market did not need County Line's milk seem to be based on the erroneous view, which she expressed at the hearing, that this issue is *respondent's* "affirmative defense" (Tr. 92). Her findings, in this respect, repeatedly refer to what respondent failed to prove, rather than to what petitioners proved.

provided in the Indianapolis order should be adopted for the expanded order, subject to minor changes.

Proponent cooperatives and handlers supported adoption of the Indianapolis pool plant provisions for the expanded order. Currently, a distributing-type plant qualifies by disposing of 50 percent of its total receipts from producers and pool supply plants on routes with at least 10 percent of such receipts disposed of in the marketing area on routes. Such requirements are herein continued subject to clarification of the present provisions and the addition of the following provision.

The pooling requirements for a distributing plant should be expanded to provide greater flexibility in monthly disposal requirements to avoid loss of pool status due to temporary changes in receipts or sales at the distributing plant. This can be accomplished by providing that a distributing plant which has met the 50 percent performance requirement in either the current or immediately preceding month and meets the minimum in-area route disposition requirement (i.e., 10 percent of total receipts at such plant) in the current month may retain pool status.

There are circumstances, such as minor changes in receipts or Class I sales, which may cause a distributing plant difficulty in meeting the 50 percent route disposition requirement for a particular month. The 2-month basis for meeting the pooling requirement for a distributing plant will minimize the occasions of inadvertent loss of pool plant status.

Also, the definition of a pool distributing plant should be clarified to insure that receipts of milk by diversion from other pool distributing plants will not be counted as producer receipts in determining percentages for qualification purposes. Milk received in such manner is a part of the normal supply of milk for the diverting handler and is included in his receipts. There are no supply plants in the market at this time. However, supply plant receipts may be a normal source of supply for the Class I needs of pool distributing plants. Consequently, any such receipts should be included in the receipts base for the purpose of determining the percentages of receipts sold on routes.

The cooperatives and handlers also proposed continuance of the main requirements for pooling supply plants which are provided in the Indianapolis order. Essentially, these provisions require the shipment each month of at least 50 percent of plant receipts of Grade A milk as fluid milk products to pool distributing plants. Qualifying shipments from supply plants, however, should be in the form of milk or skim milk since these are the products which would be needed to supplement direct-ship supplies in this market. A supply plant which meets the 50 percent shipping standard each month of September through February is automatically designated as a pool plant for the succeeding months of April through August (unless a written request for nonpool status is submitted to the market administrator). These percentage requirements are basically comparable with those in other nearby Federal orders.

One exceptor urged adoption in the Indiana order of the somewhat lower Chicago Regional order standards for supply plant qualification. In addition, it was contended that sales from Chicago Regional order supply plants to Northwestern Indiana distributing plants (currently under the Chicago Regional order) should be counted in qualifying a supply plant under the Chicago Regional order. A supply plant would be pooled, however, in the market where it makes the greater sales. This exceptor contended that the loss of bulk sales to Northwestern Indiana distributing plants which would be regulated by this order could affect the ability of certain Chicago Regional order supply plants to qualify as pool plants under such order.

The current minimum shipping requirement has been the accepted standard under the Indiana orders over a considerable period. While the Indiana markets involved have relied mainly on nearby direct-ship for most of their fluid requirements, there have been times when supply plants have associated with these markets. There was no evidence on the record of any past pooling qualification problems. The current minimum standard is in line with that of other markets having comparable patterns of utilization. Under the circumstances, no change should be made on the basis of this record.

The exceptor to the supply plant standards raised the further issue, referred to above, that certain Chicago Re-

gional order supply plants could fail to qualify under that order if sales to distributing plants in the Northwestern Indiana area were not credited to them

No specific problem in this regard was cited in the record. The record contains insufficient basis for any major change in pooling standards for supply plants under either an Indiana order or the Chicago Regional order. Any supply plant which has met the pooling standards under the Chicago Regional order for each month of August through December 1968 will qualify automatically under that order through July 1969. The intervening period permits sufficient time for interested parties to observe the operation of supply plants with respect to these markets and, if necessary, to request further consideration of supply plant standards prior to the next qualifying period. Consequently, if market conditions change so as to affect the basis of pooling, consideration can be given at another hearing to revising supply plant standards.

Producers proposed, however, to eliminate the special provision of the Indianapolis order which permits a supply plant to qualify during the months of April through July by meeting the delivery performance standards in each of the preceding months of August through March as a supply plant or distributing plant, and for December through March by meeting the supply plant requirements. This provision for supply plant qualification was adopted in May 1962 to accommodate a particular circumstance, that of a pool distributing plant which had discontinued its bottling operations but continued in the market for a time as a supply plant. They pointed out that with the closing of the plant for which the provision was developed, no purpose is served by continuing it in the order. Since the provision is obsolete, it is deleted from the order.

Provision should be made to exclude from pooling a supply plant which meets the pooling requirements of another order as well as those of this order, when greater shipments are made to plants regulated by such other order. This will assure that any supply plant which associates milk with the pool will be regulated under this order only if the plant continues its association with this market during each month. This is important in view of the automatic pooling provisions provided for in this and other

nearby orders. As previously indicated there are no supply plants associated with this market at present.

It should be noted that, with respect to another issue, the Secretary removed a provision in the interest of efficient marketing of milk. This shows that, where possible, the Secretary was concerned with efficient marketing procedures. The Secretary stated (33 Fed. Reg. 18,282, 18,289 (1968)):

Manufacturing plants in the Wisconsin portion of the production area near producer farms supplying milk for the Indiana market may be located more than 300 miles from Indianapolis. These plants serve as readily available outlets for the reserve milk of this market associated with the producer supplies located in Wisconsin.

It is in the interest of efficient marketing of producer milk, therefore, to permit the movement of reserve supplies to manufacturing facilities wherever located. Consequently, the current Indianapolis provision which provides for transfers or diversions *only as Class I milk* if moved to a nonpool plant 300 miles or more from Indianapolis is not included in this amended order. (Emphasis added.)

Since the Secretary's 1968 Decision as to the Indiana Order incorporates by reference the findings and determinations as to the predecessor Indianapolis Order (33 Fed. Reg. 18,282, 18,290 (1968)), and the Secretary's 1968 findings as to the requirements for pooling supply plants indicate that the minimum requirements previously imposed by the Indianapolis Order were being continued without major change (33 Fed. Reg. 18,282, 18,288-89 (1968)), the Secretary's 1961 Decision as to the supply plant provisions of the Indianapolis Order is also relevant.

However, the Secretary's 1961 Decision as to the Indianapolis Order, although more informative than the 1968 Decision, provides no support or rational explanation for the pumping in and pumping out requirement in the circumstances of this case. Moreover, the 1961 Decision shows that the Secretary was concerned with, and attempted to avoid, unnecessary movement of milk incident to qualifying supply plants as pool plants. (Significantly, however, the 1961 Decision explains why minimum standards are vital to prevent plants which are not really supplying the fluid needs of the market from becoming pool plants, which enables them to draw payments from the producer-settlement fund.) Specifically, the 1961 Decision as to the Indianapolis Order states (26 Fed. Reg. 67, 69-70 (1961) (emphasis added)):

Definition of plants. The minimum class prices of the order should apply to that milk eligible for distribution as Grade A milk which is received from dairy farmers at plants primarily engaged in supplying fluid milk products for sale on retail and wholesale routes in the marketing area. Such plants would be defined as "pool plants".

The basis for determining which plants shall be pool plants under the order, and thereby fully subject to regulation, should be clearly set forth in the order and apply uniformly to all plants, wherever located. Pool plant status should not be determined solely on an occasional shipment of milk to the market, or an approval by specified health authority. Such a method for determining which plants shall be subject to regulation would not provide a workable basis for administering an order for the Indianapolis marketing area.

The production of high quality milk involves extra expense. It is important that the amount of milk produced for this market under Grade A inspection be no more than that necessary to provide an adequate and dependable supply of quality milk. To encourage excessive production would represent an economic waste, since the expenditure involved in producing Grade A milk not needed on the market would result in no extra value to producers.

Essential to the operation of a marketwide pool is the establishment of performance standards to apply uniformly to all plants. Any plant, regardless of its location, should have equal opportunity to comply with the standards and thereby to participate in the marketwide pool and have its producers share in the Class I sales of the market. Whether or not plants and producers choose to supply the Indianapolis order market will depend on the economic circumstances with which they are confronted, such as prices, transportation costs, and alternative outlets.

Performance standards should be such that any plant which has as its major function the supplying of milk to the market would pool its sales and share in the marketwide equalization. On the other hand, plants only casually, or incidentally, associated with the market should not be subject to complete regulation. Neither should they be permitted or required to equalize their sales with all plants in the market. If a milk plant were to be permitted to share

on a pro rata basis the Class I utilization of the entire market without being genuinely associated with the market, then the differentials paid by users of Class I milk could be dissipated without accomplishing their intended purpose. If a plant were to be qualified and fully regulated merely by making a token shipment of milk or cream into the market for sale as Class I milk, then any milk plant which found itself in a position where it was selling a smaller share of its milk in Class I than the average for all regulated handlers might make such shipment and receive equalization payments from the pool. The only qualification such a plant would be required to meet would be compliance with the necessary health department standards.

Since reserve milk is an essential part of any fluid milk business, there will always be some excess milk in the plants of handlers supplying other markets. This will be particularly true in the months of flush production. *Plants selling primarily to other markets, or plants shipping milk on an opportunity basis to any market where supplies happen to be short, do not represent sources of milk on which the Indianapolis marketing area may depend. If such a plant, by selling a token quantity of Class I milk in the marketing area, were allowed to pool its surplus, the operator thereof could gain an unwarranted advantage in paying producers by receiving equalization payments from the Indianapolis order pool. Such a distribution of equalization payments would, in fact, reduce the blend price to producers regularly supplying the market, thereby having an adverse effect on the milk supplies upon which the market depends. This could result in the need for higher Class I prices than would otherwise be required to supply the market adequately.*

Because of the difference in marketing practices and functions between distributing plants and supply plants, separate performance standards have been provided for them. A "distributing plant" under the order would be defined as a plant in which any Grade A fluid milk product is packaged and disposed of during the month on routes in the marketing area. "Supply plant" would be defined to mean a plant from which milk, skim milk or cream is shipped during the month to a distributing plant which is qualified as a pool plant.

The term "route" would mean the delivery (including disposition from a plant store or from a distribution point and distribution by a vendor or vending machine) of any fluid milk product classified as Class I to a retail or wholesale outlet other than a milk plant or a distribution point.

In order to qualify as a pool plant, a distributing plant should be required to distribute at least 10 percent of its milk from producers and other plants during the month as Class I milk on routes to outlets in the marketing area.

A distributing plant having more than 90 percent of its business outside the marketing area or in other outlets should not be considered as essentially associated with the market. It is not considered advisable to bring such a plant under full regulation because of the minor share of its business in the marketing area. Full regulation in such case would not be necessary to accomplish the purposes of the order, and might well place such plant at a competitive disadvantage in supplying the unregulated market. Such a minimum is necessary also to avoid the possibility that a plant otherwise not associated with the market might qualify itself for equalization payments to its own advantage, and to the disadvantage of the market, by means of minor sales in the marketing area.

It is contemplated that only plants primarily engaged in route distribution of fluid milk products should be qualified as pool plants under this definition. In order to preserve this distinction, a further condition should be placed on distributing plants. This is that its total route distribution of Class I milk, both inside and outside the marketing area, must amount during the month to at least 50 percent of its receipts of Grade A milk from dairy farmers and from other plants. Any plant which does not qualify on this basis should be deemed to be primarily a supply plant and its pool status should be judged by the standards applied to such plants.

A plant from which milk for Class I uses is distributed regularly in the marketing area under normal circumstances may be expected to dispose of its milk in such a way as to exceed by a reasonable margin the minimum performance standards necessary to qualify as a pool plant. There may be from time to time plants supplying milk to the marketing area which would not qualify for

pool status. Such plants should be required to file reports, make available their records for audit by the market administrator, and be subject to payments hereinafter discussed if they are not fully subject to regulation.

The performance standards for supply plants to qualify for pool plant status should reflect the fact that currently the quantity of milk produced for the market is adequate on an annual basis for the needs of the market. At times, especially during the months of seasonally high production, distributors in the market may not need all of the milk available from producers in order to keep their Class I outlets fully supplied. *In order to assure that all the producers' milk which is pooled with the market will be available for Class I, supply plant standards should be set at levels which require that such milk will be available.*

In order to qualify for pool plant status a supply plant should ship to distributing plants which are pool plants at least 50 percent of its receipts of milk from dairy farmers in any month in the form of fluid milk products. A supply plant from which a proportionately lesser quantity of milk is disposed of in this manner should not, under the present conditions in the market, be considered as primarily associated with the regulated market.

It is recognized that if there is any demand for milk from supply plants it will be greatest during the season of low production. *For sustained periods during the months of flush production, supplies of milk received at plants located in or near the marketing area may be sufficient to supply the Class I outlets. During this part of the year, it would be more economical to leave the most distant milk in the country for manufacture, and use local supplies for Class I use. The performance provisions should not force milk to be transported to distributing plants in the months of seasonally high production in order to maintain the eligibility of supply plants to pool.*

To avoid this, provision should be made whereby a supply plant may elect to receive pool plant status during the months of seasonally high production. Such election would be available to a plant when it had supplied a substantial portion of its producer milk to distributing plants in the market during each of the immediately preceding months of seasonally low production. This would be accom-

plished by providing that a supply plant which shipped 50 percent of its producer milk receipts during each of the immediately preceding months of August through January³⁴ to distributing plants which are pool plants would thereby earn pool plant status for the months of April through July. As herein proposed pool plant status for the months of April through July would automatically accrue to such supply plant unless the operator of such plant notified the market administrator that he elected to have non-pool status for such plant beginning with any of the months during the April through July period.

From the foregoing, it is manifest that the Market Administrator's interpretation, permitting a supply plant's milk to be a qualifying shipment when it is merely pumped into and out of a distributing plant's tank enroute to a cheese plant, when the milk is needed for Class I use by other distributing plants in the market, is inconsistent with the Secretary's findings and defeats the Secretary's goal. Although this is not the appropriate time for suggesting a change in the Market Administrator's interpretation, it should be noted, briefly, that in "the field of taxation, administrators of the laws, and the courts, are concerned with substance and realities, and formal written documents are not rigidly binding." *Helvering v. F. & R. Lazarus & Co.*, 308 U.S. 252, 255 (1939). Similarly, there is no reason why the Market Administrator could not look to substance and realities, and refuse to accept as qualifying shipments sham transactions where milk is merely pumped into and out of a distributing plant's tank. (In *Windham Creamery, Inc. v. Freeman*, 350 F.2d 978, 982 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966), the court stated that the "application of a fiction may well be warranted to avoid circumvention of a [milk] regulation by deliberate subterfuge.") However, I am not sufficiently close to the total factual situation involved in the Indiana marketing area to know whether this is a desirable or feasible approach.³⁵

The Secretary's findings fully justify and rationally explain the requirement that a supply plant's milk be physically unloaded into the distributing plant's tank when the milk is needed for fluid pur-

³⁴ The qualifying months of August through January were changed to September through February in the 1968 Indiana Order provisions.

³⁵ For example, if sham transactions were not permitted, could the distributing plant keep the supply plant's milk for fluid purposes but send other producers' milk, in the same truck, to the cheese plant? If so, could that type of similar sham transaction be prevented (perhaps by an amendment) on the same theory that the sale of stock is not recognized for tax purposes if shares in the same company are repurchased within 30 days?

poses by the distributing plant. That is the only factual setting considered by the Secretary as to the qualifying months of September through February (in 1968), or August through January (in 1961).

The Secretary's findings show, however, that he wanted to avoid unnecessary movement of milk when the distributing plant did not need the milk. That is why he created a "free period" so that a supply plant could remain qualified during the months of flush production based on its past performance during the months of short production.

The circumstance presented here, where the distributing plant did not need much of the supply plant's milk for fluid purposes during the short production months, was not considered by the Secretary in his rule making capacity. In fact, the Secretary's 1968 Decision states that there "are no supply plants in the market at this time." 33 Fed. Reg. 18,282, 18,288 (1968). Hence the particular problem presented in this case had never arisen in this market before. The circumstances presented here are significantly different from the marketing conditions considered by the Secretary in his rule making capacity in 1961 and 1968.

The requirements in § 7(b) to qualify supply plants as pool plants were supported by reasoned agency decisionmaking in 1961 and 1968 as to the factual situation existing or contemplated in the market in 1961 and 1968. But that reasoned decisionmaking does not explain why the requirement of physical receipt by the distributing plant should also be applied to the changed marketing conditions involved here.

However, when marketing conditions (in existence or contemplated) change after an Order is promulgated, did Congress intend for a supply plant handler to have authority *sua sponte* to declare that the Order provisions are no longer valid, as applied to present market conditions, (surreptitiously) refuse to comply with those provisions, and still receive the benefits of having complied with the provisions? Or must the handler first present the matter to the Secretary in his rule making capacity, before complaining that the Order does not apply to changed marketing conditions? I believe the latter!

The Act provides (7 U.S.C. § 608c(3), (4), (17)):

(3) *Notice and hearing*

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of

this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) *Finding and issuance of order*

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * * * *

(17) *Provisions applicable to amendments*

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof: *Provided further*, That if one-third or more of the producers as defined in a milk order apply in writing for a hearing on a proposed amendment of such order, the Secretary shall call such a hearing if the proposed amendment is one that may legally be made to such order. Subsection (12) of this section shall not be construed to permit any cooperative to act for its members in an application for a hearing under the foregoing proviso and nothing in such proviso shall be construed to preclude the Secretary from calling an amendment hearing as provided in subsection (3) of this section. The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced the decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

The elaborate procedure for considering proposals to promulgate or amend Federal marketing orders is set forth in Vetne, "Federal Marketing Order Programs," in 1 *Agricultural Law* § 2.46 (J. Davidson ed., 1980), as follows (footnotes omitted):

§ 2.46 *Formal Rule Making Procedures for the Promulgation of Marketing Orders*

Procedures for the promulgation or amendment of federal marketing orders are governed by § 8c(3) and (4) of the AMAA, which provides that:

* * * * *

In addition, formal rules of practice have been adopted by the secretary to conform to the requirements of the Administrative Procedure Act relating to rule making "on the record." . . .

Any person may submit a proposal to the secretary requesting that a federal order be promulgated or amended. Upon receipt of a proposal, the administrator, Agricultural Marketing Service, conducts an investigation to determine if the proposal will "tend to effectuate" the act. If the administrator for any reason feels a hearing should not be held, the person making the proposal will be notified in writing, with "a brief statement of the grounds for the denial."

While proposals are most frequently submitted by producers, or their cooperatives, handlers who are regulated under an order often see the need for regulatory change, as do consumer groups. Rule making proposals, whatever the source, are considered by the secretary in light of economic and marketing conditions in the market. As a result of this objective overview, the secretary may recommend the adoption of amended orders which contain some element opposed by a producer majority, but which are accepted in a referendum on the complete order structure.

It is within the sole discretion of the secretary to make a determination whether to hold a hearing or to reject specific proposals once a hearing is held. This discretion is limited only by the requirement that if one-third or more producers participating in a milk order request a hearing, a hearing must be held if lawful order provisions are proposed.

As a matter of practice, prior to making a final determination that a hearing should be held, a proposal will generally be circulated to known interested parties, soliciting additional or alternative proposals.

If, upon receipt of proposals, the administrator is of the opinion that a hearing should be held, a notice is published in the *Federal Register* and provided to the media and known interested parties.

* * * * *

Hearings are generally held at a location within the marketing area under consideration to provide maximum access, and minimum expense, to interested parties. Interested parties may appear, testify, examine witnesses and otherwise participate fully in the hearing with or without counsel.

An administrative law judge is designated to preside over the hearing, receive evidence, rule on motions, and set the briefing date. The judge, however, does not participate in the decision making process. The rule making decision, rather, is an institutional endeavor by the agency.

A significant role at every stage of the rule making process—from proposal to final decision—is played by marketing specialists within the agency. The marketing specialist assigned to a proceeding will often participate in the consideration and investigation of a proposal, examination of witnesses at a hearing, and writing the recommended and final decisions.

The most significant role at hearings, however, is played by the participants—proponents and opponents of a proposal. Since the agency rarely makes independent proposals, and does not take a public position on industry proposals at a hearing, it is left to the participants to develop a record which will provide the evidentiary basis for a rule making decision. While a decision will inevitably require the application of administrative expertise and policy considerations, a favorable decision on any issue requires the proponent to shoulder the burden of proof. Administrative expertise cannot be exercised in an evidentiary vacuum.

Witnesses at a rule making hearing are sworn, and subject to cross-examination by other hearing participants. In practice, witnesses are generally permitted to read a prepared written statement or narrative into the record, followed by cross-examination. Witnesses are not required to respond to cross-examination questions, though failure to

respond may affect the weight given to direct testimony. Further, there is no discovery or compulsory process available in rule making proceedings.

After the hearing, interested parties may file, with the USDA hearing clerk, proposed findings and conclusions with supporting briefs or arguments.

Following certification of the transcript by the administrative law judge, and receipt of briefs, the administrator prepares a recommended decision, based on the hearing record, which is filed with the hearing clerk and published in the *Federal Register*. An opportunity to file exceptions is usually provided. Following consideration of exceptions, the final rule making decision by the secretary is published. The final decision often contains modifications, or additional narrative, in light of exceptions.

The recommended decision may be omitted where record evidence establishes extraordinary circumstances requiring expeditious action.

Hence petitioners had an appropriate avenue available for seeking an amendment to § 7(b), based on changed market conditions. But they failed to avail themselves of that remedy. In the circumstances, there is no basis for holding that § 7(b) is not supported by reasoned agency decisionmaking, as applied to changed market conditions, when petitioners failed to exercise their right to request the Secretary to consider the changed circumstances in his rule making capacity.

Petitioners rely on *Geller v. FCC*, 610 F.2d 973, 987-80 (D.C. Cir. 1979), which remanded a proceeding to the Federal Communications Commission because the Commission abused its discretion in denying a petition requesting the institution of a new rule making proceeding to reconsider the validity of a rule in view of changed circumstances (Petitioners' Brief on Tentative Decision and Order at 6). But here, petitioners did not request the Secretary to institute a new rule making proceeding to consider changed circumstances. Hence the *Geller* doctrine is not helpful to petitioners here.

In ruling on the first question certified by the ALJ, I stated (41 Agric. Dec. 649, 646-47 (1982):

By raising the issue as to the legality of the Order provisions, as interpreted by the Market Administrator, I do not wish to imply that petitioner will ultimately prevail on this issue. I have not read the rule making decision or

hearing record un-
tion where a supply
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this situation.

As stated above, exam-
decisions shows that it
to have considered the
relevant to the market

The foregoing discuss-
ment that § 7(b) is not
rule making hearing.³⁵
7(b), as applied to the
contemplated when the
plant's milk would be
was shipped from Sept
ported by the evidence
§ 608c(5), 7(D)).³⁶

* * *

³⁵ Petitioners are in no posi-
tion where action was supplied by the Ju-
dicial Officer, rather than peti-
tioners as interpreted by the Market
41 Agric. Dec. 640, 645-47 (1968).
Judicial Officer to raise additional
relevant language in the Depart-
ment's findings, see *In re Mid-States Lu-*
nom. Van Wyk v. Bergland, 5

³⁷ Since official notice was
record relating to the Secret
the 1960 hearing record here
different from the 1968 hear-
ing that the word "ship" in the
the supply plant's milk insid-
76) does not explain why the
plant does not need the milk.

³⁸ The evidence is sparse (1)
similar provisions are includ-
ed. Moreover, petitioners did not ac-
tually state in *In re Bertovich*, 36 *Id.*
Dairy, Inc., 41 Agric. Dec. 7, 2

³⁹ (5) *Milk and its products*

Although it is impor-
tant that petitioners have the burden of

respond may affect the weight given to direct testimony. Further, there is no discovery or compulsory process available in rule making proceedings.

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In ruling on the first question certified by the ALJ, I stated (41 Agric. Dec. 649, 646-47 (1982):

By raising the issue as to the legality of the Order provisions, as interpreted by the Market Administrator, I do not wish to imply that petitioner will ultimately prevail on this issue. I have not read the rule making decision or

hearing record underlying the Order provision. The situation where a supply plant's milk would not be needed may not have been reasonably foreseen at the time the Order was issued. Accordingly, it may not have been unreasonable for the Secretary not to have specifically dealt with this situation.

As stated above, examination of the 1961 and 1968 rule making decisions shows that it was not unreasonable for the Secretary not to have considered the issue presented here since the issue was not relevant to the market conditions then existing.³⁶

The foregoing discussion is also dispositive of petitioners' argument that § 7(b) is not supported by substantial evidence in the rule making hearing³⁷ and is not authorized by the Act. Section 7(b), as applied to the factual circumstances existing or reasonably contemplated when the Order was promulgated, *i.e.*, the supply plant's milk would be needed by the distributing plant to which it was shipped from September through February, is adequately supported by the evidence³⁸ and authorized by the Act (7 U.S.C. § 608c(5), 7(D)).³⁹

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³⁶ Petitioners are in no position to complain that this defense of the Secretary's action was supplied by the Judicial Officer, rather than respondent, since the Judicial Officer, rather than petitioners, *sua sponte* raised the issue as to whether § 7(b), as interpreted by the Market Administrator, is lawful *In re County Line Cheese Co*, 41 Agric. Dec. 640, 645-47 (1982). In any event, the rules of practice permit the Judicial Officer to raise additional issues, *sua sponte* (7 CFR § 900.65(b)(2)). As to comparable language in the Department's rules of practice governing disciplinary proceedings, see *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-52 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978).

³⁷ Since official notice was not taken at the 1968 hearing of the 1960 hearing record relating to the Secretary's 1961 Decision, reliance should not be placed on the 1960 hearing record here. However, the 1960 hearing record is not significantly different from the 1968 hearing record. The testimony in the 1960 hearing record that the word "ship" in the supply plant qualification provision means to deliver the supply plant's milk inside the distributing plant (1960 Hearing Record at 175-76) does not explain why that procedure is necessary or desirable if the distributing plant does not need the milk.

³⁸ The evidence is sparse (but adequate) since the issue was not controversial, and similar provisions are included in most, if not all, marketwide milk orders. Furthermore, petitioners did not adequately brief the substantial evidence question. As stated in *In re Bertouch*, 36 Agric. Dec. 133, 139-40 (1977) (accord *In re Moser Farms Dairy, Inc.*, 41 Agric. Dec. 7, 24-25 (1982)).

³⁹ (5) *Milk and its products; terms and conditions of orders*

Although it is important as to all issues to follow the principle that petitioners have the burden of proof, it is particularly important to follow that prin

Continue

ciple where petitioners contend that provisions of a milk Order are not adequately supported by evidence. This is because the promulgation hearing records relating to Federal Milk Orders frequently contain thousands of pages of testimony and exhibits. It would place an unwarranted burden on respondent, the Administrative Law Judges, and the Judicial Officer if petitioners could merely assert, without showing, that Order provisions are not supported by evidence. Whenever such a contention is made, petitioners' briefs must analyze the evidence relating to challenged Order provisions and demonstrate that such evidence is insufficient to support the challenged provisions.*****

***** It is not uncommon for judges and administrative deciding officers not to read the entire record (particularly parts of the record not cited in briefs or arguments). See Davis, *Administrative Law Treatise* (1958), Vol. 2, §§ 1103-1104.

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

* * * * *

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year, and (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * * *

(7) Terms common to all orders

Continued

It should be noted that if the Secretary's Decisions in 1961 and 1968 did not set forth reasoned decisionmaking adequately supporting § 7(b), explanations in respondent's briefs would not fill the gap. Respondent's briefs set forth justifications for the requirement at issue here (Respondent's Appeal Petition at 9; Respondent's Brief filed November 10, 1982, at 12-16). But it is well-settled that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action" (*Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). *Accord Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971).

Furthermore, even if respondent's counsel's rationalization could be considered, it is not persuasive.⁴⁰

Respondent's counsel argues (Appeal Petition at 9):

Respondent submits that the actual receipt requirement is necessary under 7 U.S.C. 608c(7)(D) because under normal circumstances only by actual receipt is the milk from [a] supply plant truly made available by the supply plant for the fluid needs of the market.

As shown here, although actual receipt makes the milk "available" for fluid needs, it does not prevent sham transactions where the milk is immediately pumped out of the distributing plant's tank, and then sent to a cheese plant in the same truck.⁴¹ Moreover, the issue presented by the changed market conditions is, "What requirement should be imposed on the supply plant when the supply plant's milk is not needed for fluid purposes and cannot be used for fluid purposes by the distributing plant to which it is shipped?" Under those circumstances, why should the supply plant's milk have to be pumped into and out of the distributing plant's tank, enroute to a manufacturing plant?

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

⁴⁰ This discussion is included so that if the Secretary holds a rule making hearing to consider the changed market conditions referred to above, the Decision will not parrot respondent's counsel's views

⁴¹ Consideration should be given to preventing such sham transactions, e.g., by a "call" provision (see *infra* in this subsection of the conclusions), or by requiring the Market Administrator to consider substance and realities, rather than form, if that is feasible (see note 35, *supra*, and text preceding note 35).

Respondent's counsel's next sentence continues (Appeal Petition at 9):

Once the Market Administrator is sure the supply plant milk has been delivered to the distributing plant during the qualifying months in the requisite quantities it is assumed that the milk will be packaged and distributed by the distributing plant.

As shown here, that assumption is not necessarily true. Moreover, the assumption is necessarily false where, as here, that portion of the supply plant's milk that is going to be pumped into and out of the distributing plant's tank is in excess of the fluid needs of the distributing plant.

Respondent's counsel's following sentence states (Appeal Petition at 9):

Of course, this assumes an arms-length relationship between the distributing plant and the supply plant which is not the situation in the instant case where a single entity (Beatrice) owns and controls the movement of milk between its supply plant, its distributing plant and its cheese plant and therefore by moving milk in certain ways is able to manipulate the Order to its advantage.

However, the lack of an arms-length relationship is not significant in a situation where the supply plant's milk is not needed by the distributing plant for fluid purposes (or by the market, if the Order is amended to require an offer to other distributing plants). Even if there had been an arms-length relationship between County Line and Meadow Gold, in a factual situation such as this, where Meadow Gold did not need and could not use the milk pumped into and out of its tank, the same pumping charade would likely have occurred. County Line paid a \$50,000 fee to Meadow Gold for the pumping in and pumping out performance (to the extent it was actually performed), and presumably County Line could have found a non-affiliated distributing plant to perform the same operation for an appropriate fee.

Respondent's counsel further argues that physical receipt by a distributing plant of a supply plant's milk is necessary because (Respondent's Brief filed November 10, 1982, at 12-13):

The basic function of a supply plant is to assemble milk at a location near such farms for efficient shipment to distant distributing plants. Demonstration of the continuing availability of this milk for fluid must be based on some objec-

tive measurement rather than on a contention that the milk is simply made available.

* * * * *

A dairy farmer does not become eligible to share in the pooling of proceeds under an order unless and until his milk is received at a plant. (See 7 CFR 1049.13 defining producer milk)

Respondent's arguments overlook the fact that it is a common provision of milk orders, including the Indiana Order, to permit a pool plant handler to pool the milk of a producer that is not physically received into the pool plant handler's plant but is, rather, shipped by diversion directly from the farm to the manufacturing plant of another party, as long as that producer's milk is received in a distributing plant or supply plant on at least one day of the month. See 7 CFR § 1049.13. In discussing the diversion requirement, the Secretary's 1968 Decision states (33 Fed. Reg. 18,282, 18,287 (1968)):

Milk of a producer eligible for diversion to a nonpool plant should be received at a pool plant each month, however, in an amount representing not less than 1 day's production. This will insure that the milk remains qualified for and available to the market.

Hence, a pool plant handler can count the entire month's production of a producer's milk in its receipts even though only 1 day's production is actually received in the handler's pool plant, provided, however, that the diverted milk does not exceed a specified amount. Respondent's counsel has not explained why some type of diversion provisions could not be promulgated where County Line's milk is not needed by Meadow Gold (or by the market, if the Order is amended to require County Line to offer the milk to other distributing plants).

Furthermore, respondent's counsel has made no effort to meet petitioner's argument that at least two other milk orders do not require that a supply plant's milk be physically received at a pool plant. Petitioner argues (Petitioner's Brief filed October 1, 1982, at 11):

Alternative methods are employed by the Secretary in Federal Milk Marketing Orders to permit the pooling of available Grade A supply plant milk without costly unloading and reloading of milk which is known to be unneeded by distributing plants. Producers associated with

supply plants within the New York-New Jersey Market, for example, share in the market-wide pool if the plant is "willing and able to supply Class I-A milk to the marketing area." (Dairy Division, AMS, U.S.D.A., *Summary of Major Provisions in Federal Milk Marketing Orders, January 1, 1981*, at 27 Table 3, note 10 (April 1981); 7 CFR § 1002.26). If the Market Administrator specifically determines that milk is needed for fluid use, and the supplier does not make shipments for this purpose, pool status is jeopardized (7 CFR §§ 1002.26-1002.27). Similar provisions, allowing market milk to be "called" for fluid use only when needed, are applied in the Upper Midwest (7 CFR § 1068.7(d)).

Although as a general rule the Secretary does not have to explain in the Decision as to one milk order why the provisions are different from those in another milk order (since there are so many differing conditions between markets), nonetheless, where the Secretary imposes a requirement that milk be pumped into and out of a distributing plant's tank enroute to a manufacturing plant, which is seemingly inefficient, wasteful, unreasonable and absurd, as applied to a factual circumstance where both plants know in advance that the milk is not needed by the distributing plant, and that it will be immediately pumped back into the same truck and taken to a cheese plant, while the Secretary has imposed much less onerous requirements in two other milk orders, the Secretary's Decision (at a new rule making hearing to consider the changed market conditions) should explain why the less onerous provisions of the two orders referred to above are not suitable for the Indiana marketing area, if that is his conclusion.

By criticizing the rationale of respondent's counsel, I do not mean to imply that there could be no logical explanation for requiring a pumping in and pumping out charade. For example, in *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1707-10 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319, *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. Dec. 17, 1976), the same pumping in and pumping out charade was upheld as necessary, under the diversion provisions, because the added expense was necessary to prevent too much manufacturing milk from being associated with the pool. Specifically, the Judicial Officer stated (*id.*): ⁴²

⁴² This decision is quoted *in extenso* since the reasoning *could be* equally applicable to the Meadow Gold-County Line situation. But it is for the Secretary (in his rule making capacity) to make that determination—not the Judicial Officer. The

To assure its own full supply from non-member sources (*i.e.*, from producers who are not cooperative members), as well as to assure as large a volume of milk as possible from such sources to supply Maggio Cheese Company [an affiliate of Michaels Dairies], [petitioner] Michaels Dairies has built up its business relationships with the non-member producers. This is good economics. However, from petitioner's point of view the system cannot work to perfection because of the Order (§ 1004.12(c)(2)) restrictions on the quantities of milk which it may *divert* to the Maggio Cheese Company during the restricted months (September through February). Milk from non-member sources may be purchased by Michaels Dairies in quantities, so far as it is available, to supply the needs of both its [distributing] plant and the Maggio Cheese Company (restricted only by the necessity to keep Michaels Dairies qualified as a pool plant by having 50 percent of its receipts in Class I), but the milk from non-member sources destined for the Maggio Cheese Company over that allowed by the Order to be diverted during the restricted months must be physically moved to and received at the Michaels Dairies plant and from there moved to the adjacent Maggio Cheese Company, *i.e.*, *transferred* to the Maggio Cheese Company. Transferring milk involves additional expenses incident to hauling, pumping, additional handling, etc. Consequently, it is to petitioner's and Maggio Cheese Company's best economic interests, while preserving the non-member source of as much of their needs as possible, to try and get as much of it *diverted* during the restricted months as possible, rather than having to transfer it to the cheese plant. This is admittedly the real objective of petitioner.

The petitioner argues that it makes no sense whatever for the Secretary to force the petitioner to bring milk to its bottling plant, and then reload it and move it to its affiliated cheese plant. To the petitioner, this is economic nonsense.

However, the Secretary must balance the interests of producers and consumers against the interests of the petitioner. Unfortunately, these interests clash.

Secretary, in his rule making capacity, should not require (in practical effect) such burdensome, pumping in-pumping out procedure if less onerous alternatives are available.

The Secretary has determined that diversion limitations during the months of September through February are necessary to prevent the association of an excessive supply of milk, or milk intended solely for manufacturing purposes, with the pool (see 36 F.R. 16517, 16518; 35 F.R. 7924, 7932; 32 F.R. 5884-5885).

As shown in Finding 13, *supra*, there was no need for diversion limitations when the Order provided for an individual handler pool. Under an individual handler pool, if a particular handler used an excessive amount of milk for manufacturing purposes, the blend price to his producers would be unfavorable in comparison to that of other handlers, and he would risk losing his producers. However, under a marketwide pooling arrangement, where all producers receive the same blend price, there is no economic "brake" to prevent a particular handler from acquiring an excessive amount of milk for manufacturing purposes. In fact, as shown above, where a handler has a wholly-owned or an affiliated manufacturing plant, there is an economic incentive to have sufficient milk associated with the Class I bottling plant to also fulfill the needs of the Class II manufacturing plant (see, also, (15)(A) Tr. 185).

The more manufacturing milk that is associated with a milk pool, the lower will be the blend price that is received by the producers. The Secretary, in determining the level of the Class I and Class II prices, must carefully estimate the volumes of milk that will be used in the various classes, since it is the blend price which is paid to producers. The effectiveness of the whole Order mechanism, therefore, depends upon a careful balancing of the volumes of milk in Class I and Class II, while at the same time preserving a full and adequate supply of milk for Class I uses flowing to the marketing area.

It is quite obvious that if a marketwide pool has unnecessary quantities of manufacturing milk associated with it, the blend price will be lower than it would have been in the absence of such unnecessary manufacturing milk, and in order to fix a price which will encourage producers to produce a sufficient quantity of pure and wholesome milk and be in the public interest, the Secretary would necessarily have to increase the class prices under the Order. That would, of course, result in higher consumer prices.

Hence, the Secretary, in taking steps to prevent unnecessary manufacturing milk from being associated with the milk pool, is not only protecting the interests of producers, but he is also protecting the interests of consumers.

Where there is a clash of interests between the handlers on the one side and the producers and consumers on the other, the statute provides a clear-cut basis for resolving the clash. Orders issued under the Act are "principally for the economic protection of producer and consumer" (*United States v. Mills*, 315 F.2d 829, 837 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819). The Act provides for the issuance of marketing Orders with or without handler approval (7 U.S.C. 608c(8) and (9)). In practice, almost no handler ever agrees to sign a milk marketing agreement, and all of the approximately 60 milk Orders were promulgated after the handlers refused to agree to the programs. It is not unusual for handlers such as petitioner to be unhappy with a program designed to regulate them for the benefit of producers and consumers.

The Secretary is required by the Act to fix such class prices in a milk Order as he finds will reflect the relevant economic factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. 7 U.S.C. 608c(18). The diversion limitation provisions are incidental and necessary to achieving that statutory goal, whether or not they interfere with the economic best interests of particular handlers.

As shown in Finding 13, there is no need to provide for diversion limitations during the months of March through August because there is little possibility that a handler may take on unneeded milk during that period for manufacturing purposes. There is ample manufacturing milk available in the market during the months of March through August. However, during the months of September through February, when milk production is generally lowest, there would be an economic incentive for a handler with an affiliated manufacturing plant to have extra milk associated with his bottling plant solely for the purpose of using it for Class II purposes. Or a handler without a manufacturing plant might be able to obtain a premium over the Class II price if he had extra milk to sell for Class II during the low-production season. That is why the diver-

sion limitations are applicable only during the months of September through February. By fashioning the Order to limit the possibility of diversions to Class II uses during those months, the Secretary not only assures consumers of an adequate supply of fluid milk during the low-production season, but he also maximizes returns to producers.

In considering whether the diversion limitation provisions are reasonably designed to achieve their purpose of preventing an excessive supply of manufacturing milk from becoming associated with the market, we must necessarily look at the broad, marketwide picture (macroeconomics), rather than an individual handler's circumstances (microeconomics). For example, if petitioner drops certain producers because petitioner does not need their milk for Class I use, and petitioner cannot divert their milk to its affiliated cheese plant because of the diversion limitations, those particular producers might be taken on by another pool handler or by a pool cooperative, and the new handler or cooperative might continuously divert the milk for manufacturing purposes. Also, if the petitioner *transfers* milk to its affiliated manufacturing plant (instead of diverting it), the milk is producer milk pooled under the Order. And there are no limits on transferring milk.

In other words, the diversion limitations do not guarantee that unneeded milk will not be associated with the pool solely for manufacturing purposes. But they are a great help. It is the Secretary's view, resulting from his widespread experience over the years with many milk Orders, and based on evidence at a number of promulgation hearings held with respect to petitioner's marketing area, that in the long run the diversion limitation provisions are a significant factor in preventing extra milk from being associated with the pool solely for manufacturing purposes. The diversion limitation provisions make sense in the long run considering the entire marketing area even though they may not make much sense to the petitioner, which is looking only at its individual situation.⁸

⁸ If transfers ever become a problem, they can be controlled. But there would seem to be no need at present to limit transfers. It would seem that the additional expenses incidental to transferring milk are sufficient to prevent unneeded milk from being associated with the pool, by means of transferring, solely for manufacturing purposes.

Perhaps the requirement that a supply plant's milk be pumped into and out of a distributing plant's tank even when both plants know that the ultimate destination of the milk is a manufacturing plant is necessary for the same reason set forth in *Michaels Dairies*, i.e., to prevent too much manufacturing milk from becoming associated with the pool. But if that is the Secretary's view, he should say so in his legislative capacity. His legislative action should, of course, be based on substantial evidence adduced at a rule making hearing.

On the other hand, if the *Michaels Dairies* reasoning is not applicable here, and the Secretary believes that it is necessary to continue to require the pumping charade even when both plants know that the ultimate destination of the milk is a manufacturing plant, the Secretary should explain his reasons for that determination in his legislative capacity. The reasons given by respondent's counsel, i.e., that only by pumping the milk into and out of the distributing plant's tank can the Secretary be assured that the milk is truly available, if needed, will not pass the test of reasoned agency decisionmaking!

Finally, it should be noted that even if I had concluded that the circumstances presented here should have been anticipated by the Secretary in 1968, and that by failing to explain the necessity for pumping milk into and out of a distributing plant's tank, the Secretary failed to engage in reasoned agency decisionmaking, I would not have granted the relief which petitioners request. Rather, I would have remanded the proceeding to the Secretary for the purpose of issuing revised findings of fact, perhaps after a further hearing. See, e.g., *In re Defiance Milk Products Co.*, 44 Agric. Dec. ____ (Jan. 24, 1985) (dicta); *In re Oak Tree Farm Dairy, Inc.*, 38 Agric. Dec. 113, 165-66 (1979) (dicta), *aff'd*, 544 F. Supp. 1351 (E.D.N.Y. 1982); *In re Borden*, 37 Agric. Dec. 987, 997-1000 (1978); *In re The Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431, 441-45 (1976). See, also, *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 99 (1962); *Addison v. Holly Hill Co.*, 322 U.S. 607, 619-23 (1944).

The remanding of the proceeding to the Secretary for further consideration in his legislative capacity would have been particularly necessary here since, if his 1968 supply plant qualification provisions were invalid, various regulatory alternatives would be presented.

First, the Secretary might conclude that his original rule (as interpreted by the Market Administrator) should be continued even under the changed circumstances, and explain why that is necessary.

Second, the Secretary might conclude that too much surplus milk is now available for possible pooling under the Indiana Order, and tighten the supply plant qualification requirements.

Third, the Secretary might conclude that the supply plant qualification requirements should be relaxed, *e.g.*, replaced with a "call" provision.

But irrespective of the alternative selected, the choice should be made initially by the Secretary in his legislative capacity.

In the present case, however, the Secretary's 1968 rule making action is in accordance with law, and the Market Administrator's determination that County Line did not qualify as a pool plant from September 1980 through February 1981 is in accordance with law.

II. The "Down-Allocation" and Compensatory Payment Provisions as to Other Source Milk Are in Accordance with Law.

Section 2(1) of the Act (7 U.S.C. § 602(1)) declares it to be the policy of Congress to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish parity prices, and section 8c(18) of the Act (7 U.S.C. § 608c(18)) modifies this to provide for the prices therein described. It is the purpose of the Act, in part, to establish and maintain an orderly market to bring about and maintain the statutory rice level. *In re Hygeia Dairy Co.*, 19 Agric. Dec. 257, 273-74 (1960), *aff'd* (S.D. Tex. Sept. 14, 1964); *In re Beatrice Foods Co.*, 15 Agric. Dec. 767, 788 (1956), *aff'd*, *Beatrice Foods Co. v. Benson*, No. 3995, N.D. Okla. 1957), *printed in* 16 Agric. Dec. 177 (1957). See, also, *United Milk Producers of New Jersey v. Benson*, 225 F.2d 527, 529 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956).

Under the allocation provisions of the Indiana Order (7 CFR § 1049.44), when County Line's milk was treated as "other source" milk rather than "producer" milk pooled under the Order, most of it was no longer classified as Class I, but was "down-allocated" to Class III, and a comparable amount of Meadow Gold's "producer" milk, previously classified mostly as Class III, was "up-allocated" to Class I.

When Meadow Gold's producer milk was originally classified in Class III, Meadow Gold was entitled to, and did, draw from the pool the difference between the blend price paid to producers and the Class III price. But when that producer milk was up-allocated to Class I, instead of withdrawing from the pool, Meadow Gold was required to pay into the pool the difference between the blend price aid to producers and Class I.

Although this turnaround in allocation of the producer milk cost Meadow Gold the difference between the Class I price and the

Class III price, this is not a compensatory payment (discussed in this section), but, rather, is merely the consequence of having producer milk that Meadow Gold originally thought would be allocated to Class III end up in Class I. The same consequence would flow to a handler which had no other source milk in its plant, but for some reason had milk it thought would be in Class III reclassified to Class I by the Market Administrator.

In addition, on that portion of the "other source milk" received by Meadow Gold from County Line that *retained a Class I allocation*, Meadow Gold was required under 7 CFR § 1049.71⁴³ to make a small compensatory payment to the producer-settlement fund equal to the difference between the weighted average (blend) price paid to producers and the Class I price.

Petitioners contend that the combined effect of the allocation provisions in 7 CFR § 1049.44, and the compensatory payment provision in 7 CFR § 1049.71, as applied to the facts here, violates the requirement of uniformity as to minimum prices to be paid by handlers to producers (7 U.S.C. § 608c(5)(A)), and creates a trade barrier prohibited by 7 U.S.C. § 608c(5)(G).

Petitioners argue that the application of the allocation and compensatory payment provisions of the Order to petitioners is particularly unlawful under the circumstances here, where Meadow Gold paid the Class I price to its affiliate, County Line, for the milk involved here.

Considering first the allocation issues, § 8c(5)(A)-(C) of the Act (quoted in note 39, *supra*) provides for marketwide pools (such as the one established under the Indiana Order) under which all handlers pay a uniform *minimum* price for milk purchased from *producers* (or associations of producers) that they use in each Class, according to its value, and all *producers* receive a uniform *minimum*

⁴³ § 1049.71 *Payments to the producer-settlement fund.*

(a) On or before the 15th day after the end of the month, each handler shall pay to the market administrator the amount, if any, by which the amount specified in paragraph (a)(1) of this section exceeds the amount specified in paragraph (a)(2) of this section:

(1) The total value of milk of the handler for such month as determined pursuant to § 1049.60.

(2) The sum of:

(i) The value at the uniform price, adjusted pursuant to § 1049.75, of such handler's receipts of producer milk and milk received from handlers pursuant to § 1049.9(c);

(ii) The value at the weighted average price applicable at the location of the plant from which received of other source milk for which a value is computed pursuant to § 1049.60(f).

price for all their milk shipped to handlers in the pool, irrespective of the use to which their particular milk is put.⁴⁴ (Frequently, as in the Indiana market, cooperatives have sufficient bargaining power to compel handlers to pay premium prices in excess of the minimum Order prices. (Findings 39-42)).

It is customary in connection with milk orders for the Secretary to determine which milk handlers and handling of milk shall be included in a marketwide pool, and which dairy farmers shall be included as "producers" whose milk is to be pooled. As stated in *In re Yadkin Valley Dairy Coop., Inc.*, 22 Agric. Dec. 970, 978 (1968), *decision on remand*, 26 Agric. Dec. 218 (1967), *aff'd sub nom. Yadkin Valley Dairy Coop., Inc. v. Freeman* (M.D.N.C. Apr. 16, 1969), *printed* in 28 Agric. Dec. 398 (1969):

For example, in *United States v. Rock Royal Cooperative, Inc.*, *supra* [307 U.S. 533 (1939)], the United States Supreme Court found nothing illegal about order provisions which did not price or pool fluid milk of handlers sold outside the marketing area. In other words, the Secretary, in promulgating a milk marketing order, must determine which handling of milk shall be isolated for the purpose of regulation. See *e.g.*, *In re Clover Leaf Dairy Company*, *supra*; *In re Tapor Dairies Company*, 14 A.D. 77 (1955), *aff'd*, N.D. Ohio Jan. 10 and Apr. 11, 1958. Appropriate standards may be prescribed to designate the dairy farmers or "producers" whose milk is to be subject to the classification, pricing and pooling provisions of an order. *Cf. United States v. Wrightwood Dairy Co.*, 127 F.2d 907, 911 (7th Cir. 1942); *Vogt's Dairies, Inc. v. Wickard*, 45 F.Supp. 94 (S.D. N.Y. 1942). *Cf. also, Bailey Farm Dairy Co. v. Anderson*, 157 F.2d 87 (8th Cir. 1946), *cert. denied*, 329 U.S. 788 (1946).

Since distributing plants pooled under a Federal Order, such as Meadow Gold, frequently receive milk from a number of different sources and utilize the milk in a number of different Classes, marketwide pool orders have very complex allocation provisions to determine which milk was regarded as used in each particular manner. The allocation provisions of the Indiana Order provide (7 'R § 1049.44):

⁴⁴ The Act also authorizes individual handler pools, under which all producers delivering milk to the same handler receive uniform minimum prices for their milk irrespective of the uses made of their particular milk by the handler (7 U.S.C. § 608c(5)(B)(ii)).

§ 1049.44 *Classification of producer milk.*

For each month the market administrator shall determine for each pool plant the classification of milk received from producers and from handlers pursuant to § 1049.9 (b) or (c) and the classification of milk received from producers by each handler pursuant to § 1049.9 (b) or (c) that was not received at a pool plant, as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1049.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1049.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1049.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph (a)(5) shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of

another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1049.40(b), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1049.40(b)(1) that was not subtracted pursuant to paragraphs (a) (4), (5), and (6) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order;

(v) Receipts of reconstituted skim milk in filled milk from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2) of this section; and

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant;

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a) (2) and (7)(v) of this section for which the handler requests a classification

other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a) (2), (7)(v), and (8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii) (a) through (c) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and then Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be the pounds of skim milk remaining in decreased by a like amount. In such case, each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount:

(a) Multiply by 1.25 the sum of the pounds of skim milk remaining in Class I at this allocation step at all pool plants of the handler (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler);

(b) Subtract from the above result the sum of the pounds of skim milk at all pool plants of the handler in producer milk, receipts of fluid milk products from pool plants of other handlers, from handlers pursuant to § 1049.9 (b) and (c), and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(c) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants that remain at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such

plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1049.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(5) and (7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2), (7)(v), and (8) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to this paragraph exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step

at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to this paragraph exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a) (7)(vi) and (8)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(12) (ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(a) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1049.45(a); or

(b) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler);

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined

exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computation pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipt from handlers pursuant to § 1049.9(b) and (c) and in receipts of fluid milk products and bulk fluid cream products from other pool plants according to the classification assigned pursuant to § 1049.42(a); and

(14) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as "overage";

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

All Federal Milk Orders, including the Indiana Order involved here, give priority to the "producers" in the pool in the assignment of milk to Class I utilization, rather than to "other source" milk.⁴⁵ The allocation provisions are explained in the Secretary's 1961 De-

⁴⁵ Similar provisions giving priority to "producer" milk over "other source" milk in the assignment of milk to Class I are contained in the New England Order (7 CFR § 1001.43-D.47); the New York-New Jersey Order (7 CFR § 1001.45); the Middle Atlantic Order (7 CFR § 1004.44); the Upper Florida Order (7 CFR § 1006.44); the Georgia Order (7 CFR § 1007.44); the Tennessee Valley Order (7 CFR § 1011.44); the Tampa Bay Order (7 CFR § 1012.44); the Southeastern Florida Order (7 CFR § 1013.44); the Chicago Regional Order (7 CFR § 1030.44); the Southern Illinois Order (7 CFR § 1032.44); the Ohio Valley Order (7 CFR § 1033.46); the Eastern Ohio-Western Pennsylvania Order (7 CFR § 1036.44); the Southern Michigan Order (7 CFR § 1040.44); the Michigan Upper Peninsula Order (7 CFR § 1044.46); the Louisville-Lexington-Evansville Order (7 CFR § 1046.44); the Indiana Order (7 CFR § 1049.44); the Central Illinois Order (7 CFR § 1050.44); the St. Louis-Ozarks Order (7 CFR § 1062.44); the Greater Kansas City Order (7 CFR § 1064.44); the Nebraska-Western Iowa Order (7 CFR § 1065.44); the Upper Midwest Order (7 CFR § 1068.44); the Black Hills, South Dakota Order (7 CFR § 1075.46); the Eastern South Dakota Order (7 CFR § 1076.44); the Iowa Order (7 CFR § 1079.44); the Alabama-West Florida Order (7 CFR § 1093.44); the New Orleans-Mississippi Order (7 CFR § 1094.44); the Greater Louisiana Order (7 CFR § 1096.44); the Memphis, Tennessee Order (7 CFR § 1097.44); the Nashville, Tennessee Order (7 CFR § 1098.44); the Paducah, Kentucky Order (7 CFR § 1099.44); the Ft. Smith, Arkansas Order (7 CFR § 1102.44); the Southwest Plains Order (7 CFR § 1106.44); the Central Arkansas Order (7 CFR § 1108.44); the Subbock-Plainview, Texas Order (7 CFR § 1120.44); the Oregon-Washington Order (7 CFR § 1124.46); the Puget Sound-Inland Order (7 CFR § 1125.44); the Texas Order (7 CFR § 1126.44); the Central Arizona Order (7 CFR § 1131.44); the Texas Panhandle Order (7 CFR § 1132.44); the Western Colorado Order (7 CFR § 1134.44); the Southwestern Idaho-Eastern Oregon Order (7 CFR § 1135.44); the Great Basin Order (7 CFR § 1136.44); the Eastern Colorado Order (7 CFR § 1137.44); the Rio Grande Valley Order (7 CFR § 1138.44); and the Lake Meade Order (7 CFR § 1139.44).

cision as to the Indianapolis Order as follows (26 Fed. Reg. 67, 74 (1961)):

Allocation. The order provides for determining the value of approved milk at a plant each month on the basis of the classification of such milk. It is necessary, therefore, if a plant has butterfat or skim milk other than that received in milk from approved dairy farmers, to determine the quantities of milk in each class to be assigned to approved milk.

The milk of approved dairy farmers who are primarily engaged in supplying the market should be given priority in the assignment to the Class I utilization at approved plants. This is necessary to insure the stability of the classified pricing program of the order. If the order permitted handlers to obtain unpriced other source milk for Class I uses whenever it was advantageous to do so while approved milk in the plant was utilized in Class II [then the lowest Class], the market would be deprived of a dependable supply of milk and the order would not be effective in carrying out the purpose of the Act.

In general, the allocation procedure requires that skim milk and butterfat, respectively, in each approved plant be assigned to approved milk after making the following deductions from gross utilization starting with Class II milk, except as otherwise noted:

(1) Fluid milk products in consumer packages subject to pricing under another order (from Class I);

(2) Other source milk not subject to Class I pricing provisions of another order;

(3) Other source milk in bulk subject to pricing under another order;

(4) Beginning inventory;

(5) Receipts from other handlers (according to classification); and

(6) Overage.

Separate allocation is provided for other source milk received under varying circumstances to facilitate the application of the compensatory payment provisions of the order and to provide flexibility in plant operations. Provi-

sion is made to allocate to Class I milk certain packaged fluid milk products subject to pricing under another Federal order. This will have the effect of giving the same treatment to such items moved from a plant under another Federal order whether distributed directly to consumers in the marketing area from such plant, as is sometimes the case in this market, or imported through an Indianapolis order approved plant.

The favoring of pool producers over other source milk in allocating producer milk to Class I was expressly upheld in *Bailey Farm Dairy Co. v. Anderson*, 157 F.2d 87, 89-97 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946). In *Bailey Farm*, the court held (157 F.2d at 93-96):

The effect of provisions (3), (4) and (5) of § 903.3(e), which is the formula in question, is to require a handler, who also purchases outside milk, to allocate to local producers' milk, for price-payment purposes, 95 per cent of his Class I utilization, if he has received producers' milk in that amount or greater, and, if not, then to the full extent of such milk received. In other words, in computing the minimum price to be paid producers, a handler is required to treat producers' milk as being entitled to payment on the basis of up to 95 per cent of his Class I utilization, before his use of outside milk can be taken into account as a factor affecting the market price of producers' milk. To illustrate with the example used in the administrative findings, "if a handler receives 100 pounds of milk from producers and 100 pounds from a Chicago dealer and uses 150 pounds as Class I and 50 pounds as Class II, at least 95 pounds of local producers' milk shall be considered as used for Class I purposes." . . .

The handlers contend here, as we have indicated, that these provisions of the allocation formula are not authorized by 7 U.S.C.A. § 608c (5), which directs that milk under marketing orders shall be classified "in accordance with the form in which or the purpose for which it is used" and provides that such orders shall contain only such "terms and conditions" as the statute authorizes and "no others." They urge that the allocation formula classifies milk on the basis of its source instead of its use, and so violates the statute. But the word "source" is here hardly more than a beguiling term for conjuring a legal artificiality into the distinction which inherently exists between producers' and

non-producers' milk under the regulative purposes of the Act.

It is to be borne in mind that the classification requirement in 7 U.S.C.A. § 608c (5) (A) has reference to producers' milk, so that the question under this provision is merely whether the allocation formula compels a handler to pay for producers' milk on other than a form-of-use or purpose-of-use classification basis. Two classes of use, Class I and Class II, have properly been established by the order for classification purposes. § 903.3(b). The order does not compel a handler to pay producers for any greater utilization of milk than he makes in the particular class. The allocation formula therefore does not reach outside the established classes or beyond the handler's utilization in them. The operative effect of the formula has heretofore been explained. Its technical aspect in the order is simply that of a device for arriving at the classification of producers' milk, where the situation is complicated by the factor of the handler's use of outside milk. Under the admitted practice of a handler of commingling all his approved milk, some method of allocation for classification purposes would in any event be necessary on his part.

The handlers insist that proration is the only proper and just method of allocation, but they, of course, are looking at their own position as much as that of producers, while the statute looks primarily at that of producers. There can be no doubt that proration is a permissible method, where it is determined to be an adequate means of dealing with such a market situation in the light of the producers' interests. But it cannot be said that it is the only permissible method, where the Secretary of Agriculture has concluded that it does not sufficiently solve the effect on producers' prices of a fluid use of outside milk and where that conclusion cannot be held to be without a rational basis as a matter of administrative judgment.

In a mechanical sense, the formula here adopts as its basis of classification for producers' milk the handler's available uses as of the time the milk is received. It treats such milk as being entitled for price purposes to the position of the handler's highest-class use (up to the extent of 95 per cent), which is the use to which it naturally would be applied except for the handler's purchase of outside

milk. The District Court expressed its view thus: "Here the Secretary takes the uses available, in the case of the importing handler, prior to the mixing of the producers' milk and imported milk, as the yardstick or formula for fixing classification of the milk." 61 F.Supp. at page 220. Or, as we have previously put it, a handler, for the purpose of computing the amount of the uniform price to be paid producers, is required to treat producers' milk as entitled to payment on the basis of up to 95 per cent of his Class I utilization, before his use of outside milk can be taken into account as a factor affecting the market price of producers' milk.

We think such an allocation to available use is an authorized use-of-milk classification for price-formula purposes under the statute. It is the handler's actual utilization of milk that controls the operation of the formula. The term "use" or "used" in 7 U.S.C.A. § 608c(5) (A) is not required to be read as one of literalness or consumptive ultimacy, but it is entitled to be given a practical regulatory significance in relation to handlers' processes and the effect of their mode of doing business upon the market problem. Previous decisions have so recognized. Thus, in *Queensboro Farms Products, Inc., v. Wickard*, 2 Cir., 137 F.2d 969, it was held (one judge dissenting) that a classification of producers' milk on the basis of the form in which it was moved from a handler's plant was a valid use classification for price-formula purposes, no matter what might be its actual ultimate utilization. Again, in *Waddington Milk Co. v. Wickard*, 2 Cir., 140 F.2d 97, 101, the court declared: "Given the conditions and the purpose, there appears to be nothing unreasonable in selecting as the controlling point for determination of the form in which milk is to be classified for the fixing of wholesale prices the time when it leaves the initial receiving plant of the distributor." The Supreme Court has refused to read other language in 7 U.S.C.A. § 608c(5) (A) in a literal significance which would defeat the regulatory purpose of the Act, when it held in *United States v. Rock Royal Co-operative*, 307 U.S. 533, 578-580, 59 S.Ct. 993, 1016, 83 L.Ed. 1446, that an "agency" cooperative was subject to the Agricultural Marketing Agreement Act, even though it had not technically "purchased" the milk of its producers, because "As here used the word 'purchased' means 'acquired for

marketing.” It also would seem to be entitled to note at least, in considering whether the allocation formula here is violative of the statute, that at the time the Agricultural Marketing Agreement Act was enacted there were outstanding under the Agricultural Adjustment Act, 48 Stat. 31, 49 Stat. 750, which the Agricultural Marketing Agreement Act re-enacted and of which 7 U.S.C.A. § 608c(5) was a part, several milk orders containing allocation provisions indistinguishable in principle from the present formula, and that in section 4 of the Agricultural Marketing Agreement Act, 50 Stat. 249, 7 U.S.C.A. § 672, Congress saw fit to declare that all outstanding orders “are hereby expressly ratified * * *.” And, finally, in hospitable approach to the question of statutory construction, it should be observed that if allocation of highest-class utilization to producers’ milk as against outside milk is not permissible as a use classification for price purposes under 7 U.S.C.A. § 608c(5) (A) then a handler could by segregation and use of his outside milk in Class I completely frustrate the regulatory purpose of the statute.

. . . Nor does the formula violate the provision in 7 U.S.C.A. § 608c(5) (A) that minimum class prices shall be uniform as to all handlers. The minimum class prices per hundred weight are untouched by the formula. The total amount distributable by an importing handler to his producers will be greater than before, but this is only because he is required to pay producers on the basis of more of his Class I utilization. The fact that the uniform price to producers from an importing handler may, because of the increased Class I allocation under the formula, be slightly greater than the uniform price to producers from some non-importing handler having a less volume of Class I milk-use, is not legally distinguishable from the differences which have theretofore existed and will continue to exist in the uniform prices paid to producers by the separate handlers because of the variation in the volume and proportion of their Class I and Class II utilizations. Such differences among handlers in the uniform price payable to producers are inherent and clearly contemplated by the statute in any market of individual-handler pools. [Footnotes omitted.]

Although the milk Order involved in *Bailey Farm Dairy*, just noted, provided for an individual handler pool, the rationale is

equally applicable to the Indiana marketwide pool. As the court stated in *Bailey Farm Dairy*, there is a "distinction which inherently exists between producers' and non-producers' milk [*i.e.*, other source milk] under the regulative purposes of the Act" (157 F.2d at 93-94). And as stated in the quotation from *Yadkin Valley, supra*, in this subsection discussing the allocation issues, it is well-settled that the Secretary has the authority to define which "producers" are to be included in pricing and pooling under a particular Federal Order.

The requirement in § 8c(5)(A) (quoted in note 39, *supra*) that "[s]uch prices shall be uniform as to all handlers" refers only to "minimum prices" for each use classification which all handlers shall pay "for milk purchased from producers or associations of producers" (7 U.S.C. § 608c(5)(A)). The uniformity requirement in § 8c(5)(A) does not apply to other source milk purchased from persons not defined as producers (or associations of producers) in the Indiana Order. Under the Indiana Order, all handlers, including Meadow Gold, paid the same "minimum prices" for each use classification "for milk purchased from producers or associations of producers."

Accordingly, here, as in *Bailey Farm Dairy*, the allocation formula does not "violate the provision in 7 U.S.C.A. § 608c(5)(A) that minimum class prices shall be uniform as to handlers. The minimum class prices per hundred weight are untouched by the formula [allocating other source milk to the lowest Class]." (157 F.2d at 95.)⁴⁰

In *Bailey Farm*, the court also upheld the validity of the allocation provisions under the "trade barrier" provisions of § 8c(5)(G) of the Act, but since the court interpreted § 8c(5)(G) literally (157 F.2d at 96), we must look to the Court's decision in *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 81-99 (1962), for resolution of the § 8c(5)(G) issue. We will consider § 8c(5)(G), with respect to the allocation provisions, just discussed, after considering § 8c(5)(G) in relation to the compensatory payment issue.

Petitioners contend that the requirement in 7 CFR § 1049.71, that Meadow Gold make a compensatory payment into the pool, equal to the difference between the Class I price and the blend price paid to producers, on that portion of County Line's (other source) milk that retained a Class I classification, violates the

⁴⁰ Similarly, the uniformity requirement in § 8c(5)(B)(ii), not in issue here, relates only to the prices paid by handlers for milk delivered by "producers and associations of producers" (7 U.S.C. § 608c(5)(B)(ii)). The uniformity requirement in § 8c(5)(B)(ii) has nothing to do with other source milk purchased from persons not defined as producers (or associations of producers) in the Indiana Order.

"trade barrier" provisions of § 8c(5)(G) of the Act.⁴⁷ Section 8c(5)(G) of the Act provides (7 U.S.C. § 608c(5)(G)):

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

If § 8c(5)(G) were construed literally, the words "in any manner limit" would apply only to "the products of milk," rather than to milk. Under such a literal interpretation, the only restriction in § 8c(5)(G) applicable to milk, as distinguished from the products of milk, would be that an Order could not prohibit the marketing of milk in a marketing area that was produced in a different production area.

Such a literal interpretation of § 8c(5)(G) was adopted "[f]rom the language of the provision and its legislative history" in *Bailey Farm Dairy Co. v. Anderson*, 157 F.2d 87, 96 (8th Cir.), *cert. denied*, 329 U.S. 788 (1946); by Circuit Judge Learned Hand, dissenting in *Kass v. Brannan*, 196 F.2d 791, 800 (2d Cir.), *cert. denied*, 344 U.S. 891 (1952); and by Justice Black, dissenting in *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 100-10 (1962) ("the whole legislative history persuades me that Congress knew exactly what it was saying" (*id.* at 105)).

However, the majority in *Lehigh Valley* construed § 8c(5)(G) so that the words "in any manner limit" apply to milk, as well as to the products of milk, based on their interpretation of the legislative history of the Act (370 U.S. at 91-97). Although I believe that this matter should be re-examined by the Supreme Court, for the purposes of this case, I am, of course, bound by the majority decision in *Lehigh Valley*.

Lehigh Valley invalidated, under § 8c(5)(G), the compensatory payment provisions of the New York-New Jersey Order. However, the compensatory payment provisions invalidated in *Lehigh Valley* were significantly different from those in the Indiana Order involved here.

Lehigh Valley involved a partially regulated plant that was required to make a compensatory payment, for other source milk distributed in the marketing area in fluid (Class I) form, equal to the difference between the Class III price and the Class I price. In

⁴⁷ It is not clear whether petitioners also contend that the compensatory payment violates handler uniformity under § 8c(5)(A), but, in any event, as shown above, the handler uniformity requirement under § 8c(5)(A) does not relate to "other source" milk, which is the only milk involved in the compensatory payment issue.

Lehigh Valley, the Court used an example (from the evidence in the case) of a plant that paid in excess of the Class I price for its milk, and then was required to make a compensatory payment equal to the difference between the Class I and Class III prices, which in September 1957 was \$2.78 per cwt. This forced the plant to pay \$9.18 per cwt. for its fluid milk sold in the area, while pool plant handlers paid only the Class I price, which was \$6.23 in August 1957. (370 U.S. at 86.) The particular provisions of the New York-New Jersey Order were held to create an economic trade barrier which effectively restricted nonpool milk from competing in the market, in violation of § 8c(5)(G) of the Act (370 U.S. at 81-99).

Significantly, the Court in *Lehigh Valley* indicated, without deciding the matter, that a compensatory payment equal to the difference between the blend price and the Class I price, such as we have in the present case, might be justified. The Court stated (370 U.S. at 87-88 n.13):

Other marketing orders, applicable in some areas, assess a compensatory payment equal to the difference between the "blend price" paid in the area for pool milk and the Class I price, thus treating the handler of nonpool milk as if he were a member of the pool with respect to such milk as he introduced into the marketing area.

* * * * *

The latter method [referred to in the sentence quoted immediately above] treats the handler of nonpool milk who buys at a price in excess of the blend price as if he were a member of the pool since a handler in the pool may, if he chooses, pay his producer *more* than the "blend price" set by the Market Administrator, see *Stark v. Wickard*, 321 U.S. 288, 291, but must still account to the Producer Settlement Fund as if he had paid only the "blend price." By treating nonpool milk in the same manner, the Secretary might be able to justify a compensatory payment equal to the difference between the nonpool milk's "use value" and the "blend price," though we do not decide the question.

In the present case, we have the situation referred to in the preceding quotation, *i.e.*, where pool handlers are required (by the co-operatives) to pay more than the blend price for "producer" milk (Findings 39-42).

In *In re Chappell's Products, Inc.*, 25 Agric. Dec. 451, 456-57 (1966), the validity of a compensatory payment equal to the differ-

ence between the blend price and the Class I price, such as we have here, was upheld, as follows:

The compensatory payment provisions here in controversy . . . provide, during the months of January through September, for payment by a nonpool plant handler into the producer-settlement fund on Class I milk disposed of in the marketing area at the rate of . . . and at the rate of the difference between the order Class I and blend prices during the months of October through December. Turning first to the latter rate of payment, that is, the difference between the Class I and uniform blend price, we find none of the elements present which resulted in the finding of a "trade barrier" in the *Lehigh* case. In fact, this rate of payment, we believe, patently results in the "competitive parity" among operators of pool and nonpool plants envisioned by the Court in *Lehigh*. By virtue thereof, the partially regulated handler merely is placed in the position of the pool plant handler as to the Class I milk the former disposes of in the marketing area, that is, the regulated handler pays the blend price to producers and the difference between such price and the order Class I price into the producer-settlement fund on all milk utilized in that class with the nonpool plant handler making a similar payment into the fund only on Class I milk disposed of in the marketing area. The rate of compensatory payment imposed during the months of October through December affords parity of treatment and does not place any burden upon a nonpool plant handler which is not equally imposed upon a fully regulated handler. Petitioner's complaint in this regard must fail. [Footnotes omitted.]

In the Secretary's 1961 Decision as to the Indianapolis Order, the secretary explained the compensatory payment provision as follows (26 Fed. Reg. 67, 76-77 (1961)):

Payments on unpriced milk. The order should provide that payment be made into the producer-settlement fund with respect to unpriced milk which is allocated to Class I milk in a pool plant.

Receipt of milk in excess of Class I disposition is necessary to operate a fluid milk business. Because of seasonal fluctuations in production without corresponding changes in demand, this excess or reserve milk must be marketed in manufactured form in competition with products made

from ungraded milk. The existence of this reserve Grade A milk, which must be marketed at a lower price, is the primary cause of the instability which may affect fluid milk markets.

Considerable volumes of Grade A milk must be disposed of as surplus by various unregulated plants from which the Indianapolis order handlers may obtain milk. When milk is available in substantial volumes from nonpool sources, handlers under the order could obtain such milk at prices reflecting its value as surplus milk, which prices would approximate the Class II price under the order [then the lowest Class.] During the seasonally high production months of April, May and June, the compensation payment on other source milk allocated to Class I milk should be the difference between the minimum price of producer milk used for surplus (Class II) and the Class I price adjusted to the location of the plant from which such other source milk was received from farmers. This rate will reflect generally the difference in the value between unregulated and regulated milk for Class I use at that time.

During the months of July through March, when milk supplies tend to be shorter than in other months, it is not likely that other source fluid milk products will be available to the market at surplus prices. It may reasonably be expected that during such months milk would be available from unregulated sources at prices more nearly at the level of the uniform price under the order. The compensation payment during these months should be the difference between the marketing area uniform price to producers and the Class I price both adjusted to the location of the plant from which such fluid milk products are supplied. The relationship between the supply of and demand for milk in the market in the July through March period tends to fluctuate from year to year according to marketing conditions. These conditions will generally prevail also in surrounding markets which are potential sources of supply for unpriced milk. Thus, the rate of compensation payment based on the difference between Class I and uniform prices will adjust itself automatically in these months in accordance with the proportion of Class I milk to the total milk pooled.

The rates which are here found to be appropriate for the Indianapolis marketing area give recognition to general competitive conditions in the purchase and sale of fluid milk products. However, since such conditions do not prevail uniformly in all instances and since all transactions are not made under the same circumstances, it would not be administratively feasible to adjust prices or payments to individual transactions.

It is therefore necessary to have definite and specified rates applicable to all handlers similarly situated. The rates herein provided are those which will best effectuate the intent of the Act under current marketing conditions in the area.

Other source milk used in the form of nonfat dry milk should be considered to be from a source at the location of the pool plant where it is used. In some instances there will be no and in all other cases insignificant transportation charges per hundredweight experienced by handlers on such other source milk. By following this procedure, the compensation payment on other source milk derived from nonfat dry milk will be comparable to that on any other unpriced milk which is allocated to Class I milk.

A handler whose distributing plant fails to qualify as a pool plant should make payment to the producer-settlement fund of either (1) the amount of Class I milk sold in the marketing area multiplied by the difference between the Class I and Class II price during April, May and June and by the difference between the Class I and uniform price during other months, or (2) the amount by which total payments to dairy farmers are less than the total amount of the plant's obligation to producers which would be computed as if such plant were a pool plant. Under the first option the amount of milk on which a handler would make payment should be reduced by his receipts of Class I milk from pool plants. Because such milk would be priced as Class I milk at the regulated plant where it was received from producers, the pool would not be disadvantaged and the integrity of regulation would be preserved.

If the handler elects to make payments under the first option, the regulatory plan will be protected in the same manner and to the same extent as is provided with respect to compensatory payments on other source milk. If the

handle chooses to pay the full utilization value of his milk either directly to his own farmers or by combination of payments to his farmers and to the producer-settlement fund, he will obviously not have any advantage in terms of the minimum order class prices on his sales of Class I milk in the marketing area, for his total minimum obligation for milk will be determined in exactly the same way as if he were a fully regulated handler.

Affording this last option to nonpool plants which distribute some Class I milk in the marketing area will adequately protect the regulatory plan in this market. In the areas from which it is expected such nonpool handlers would procure supplies, no great quantities of milk are available. Moreover, the size of handlers who would use this option is relatively small. It is expected also that the difference between the Class I price and uniform price, which will prevail in this market, will be relatively minor. The price which these handlers would be required to pay under the option and the uniform price payable by wholly regulated handlers would not differ greatly. Consequently, the exercise of this option could not have a disruptive influence on the handling of milk in this area. For these reasons, it is not necessary, in order to maintain the integrity of the regulatory plan in this market, to require these partially regulated plants to make payments into the producer-settlement fund if it is ascertained that they have paid their producers at least the total amount of money which they would be required to pay if they were fully regulated.

No compensation payment should be required on milk classified and priced as Class I under another Federal milk marketing order. The minimum prices for Class I milk under other Federal orders where Indianapolis order handlers might obtain supplemental supplies approximate the Indianapolis order Class I price as adjusted for location of the supplying plants. Since handlers operating plants under other Federal orders must pay for producer milk on a utilization basis, they would not be in a position to dispose of their surplus producer milk in the Indianapolis marketing area for Class I use at less than Class I prices.

Although the Secretary's Decision as to the 1968 Indiana Order is silent as to compensatory payments, as stated above in § I(B) of the conclusions, the 1968 Decision expressly incorporates the 1961 Findings, 33 Fed. Reg. 18,282, 18,290 (1968). And the 1961 Decision

adequately explains the need and justification for compensatory payments in the Indiana Order. However, the amount of the compensatory payment was reduced in 1968 because of *Lehigh Valley*.

After discussing the compensatory payment cases involving § 8c(5)(G) of the Act, it is concluded in Vetne, "Federal Marketing Order Programs," in 1 *Agricultural Law* § 2.37, at 129 (J. Davidson ed. 1981):

In conclusion, federal milk order pricing provisions are not unlawful as violative of uniformity (§ 8c(5)(A)), or as trade barriers (§ 8c(5)(G)), despite economic disadvantage to particular handlers or producers,³⁵⁴ if they are reasonably related to an authorized regulatory purpose. However, order provisions may be voided on review where the adopted regulatory remedy far exceeds the need, as in the case of *Lehigh*, or if a sweeping and burdensome remedy is chosen where a less onerous alternative is available.³⁵⁵

In the present case, petitioners have failed to prove that the Indiana compensatory payment provision establishes a prohibited trade barrier. The amount of the compensatory payment is relatively small, since the difference between the Class I price and the weighted average (blend) price is relatively small. For example, in November 1980, the Class I price was \$13.56 and the weighted average (blend) price was \$13.32, a difference of only 24¢ (RX 7). This is almost *de minimis* when compared to the \$2.78 compensatory payment invalidated in *Lehigh Valley*. In fact, if the November 1980 1¢ compensatory payment were indexed to take into consideration inflation since September 1957, when the compensatory payment validated in *Lehigh Valley* was \$2.78, the 24¢ compensatory payment would be reduced to about 7¢, or about 2½% of the compensatory payment invalidated in *Lehigh Valley* (\$0.07 ÷ \$2.78).

Moreover, the cooperatives in the Indiana market have a very strong bargaining position and compel handlers buying milk to pay premiums in excess of the blend price required by the Order (Find-

³⁵⁴ See *United States v Mills*, 315 F2d 828, 838 (4th Cir), *cert denied*, 375 U.S. 819 (1963) ("Absolute equality is not demanded to sustain the operation of the order"); see also *Lewes Dairy, Inc v Freeman*, 401 F2d 308 (3d Cir 1968), *cert denied*, 394 US 929 (1969) (rejecting a § 8c(5)(G) argument by a handler, complaining of a competitive disadvantage in distribution outside the marketing area, when it became fully regulated by virtue of a small percentage of distribution within the area).

³⁵⁵ See *Fairmont Foods Co v Hardin*, 442 F2d 762, 772 (DC Cir 1971); see also Exec Order No 12044, 43 Fed Reg 12661 (1978), *reprinted in* 5 USCA § 553 app, at 86 (Supp 1980), *amended by* Exec Order No 12221, 45 Fed Reg 44249 (1980). This Executive Order, entitled "Improving Government Regulations," essentially requires agencies to adopt the least burdensome of acceptable regulatory alternatives.

ing 42). Since petitioners offered no evidence as to what competing handlers were paying for milk, which was supplied mostly by cooperatives (Findings 39-42), petitioners have failed to sustain their burden of proof, in this respect.

In *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969), the court held that a handler complaining that the Order created an unwarranted trade barrier must prove the prices its competitors paid for milk, and that it could not merely rely on abstract assertions that the operation of the Order creates a trade barrier. The court stated (*id.*):

Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity of the agency's ruling. Applying these standards to the present appeal, it was incumbent on Lewes to demonstrate at the administrative hearing the existence of the alleged trade barrier by showing that it paid more for its milk than its unregulated Delaware competitors. Unless these competitors do in fact enjoy a price advantage, it cannot be said that Lewes suffers an economic burden caused by the Order. The only evidence Lewes offered on the point was the testimony of its treasurer which has been heretofore recounted. It fell short of the required specific showing.

* * * * *

Reviewing the record of the administrative proceedings, it is clear that the Secretary's findings were supported by substantial evidence and that Lewes's trade barrier assertion remained a mere abstraction without evidentiary support. . . . Lewes's challenge to the validity of the Order rests primarily on the assertion that it is unable to meet competition from unregulated handlers in Delaware in the acquisition and sale of milk. The Secretary concluded that:

"[Lewes] offered no evidence as to the prices paid or other costs incurred by its competitors, and there is accordingly no basis upon which we can compare costs or conclude that [Lewes's] costs are greater, as asserted by its witness."

The District Court rejected the Secretary's conclusion and arrived at an opposite result with the statement: "The

record clearly shows that Lewes is put at a severe competitive disadvantage by the operation of the Secretary's order." Its finding was based on what amounted to an abstract assertion by Lewes that the operation of the Order created an alleged economic trade barrier to its competitive position in the unregulated Delaware area. In overturning the Secretary's decision the District Court exceeded its function in a review proceeding. Contrary to the determination of the District Court, we find it clear that the findings and conclusions of the Secretary were adequately substantiated and should not have been disturbed. [Footnotes omitted.]

Furthermore, even if petitioners had introduced evidence showing that the cost of Meadow Gold's milk, when added to the compensatory payment, was higher than its competitors' costs, petitioners still would not have shown that the compensatory payment provision created a prohibited trade barrier.

In the first place, as stated above in *Vetne*, "Federal Marketing Order Programs," in 1 *Agricultural Law* § 2.37, at 129 n.354 and related text (J. Davidson ed. 1981), mere economic disadvantage to particular handlers or producers is not enough to prove a prohibited trade barrier where the regulatory remedy does not far exceed the need. *Vetne* relies in part on *United States v. Mills*, 315 F.2d 828, 838 (4th Cir.), *cert. denied*, 374 U.S. 832, 375 U.S. 819 (1963), which held:

Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. *United States v. Rock Royal Co-op.*, *supra*, 307 U.S. 533, 568-581, 59 S.Ct. 993, 83 L.Ed. 1446. Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot "produce complete equality, for the variables are too numerous", he "fulfills his role when he makes a reasoned" Order. *Mitchell v. Budd*, 350 U.S. 473, 480, 76 S.Ct. 527, 531-532, 100 L.Ed. 565 (1956).⁴⁸

In the second place, the Class I price paid by Meadow Gold to County Line was not a price negotiated between arms-length handlers, but, rather, was the price negotiated between one division of

⁴⁸ *Accord Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 319-20 (3d Cir. 1968); and see *Dairymen's League Cooperative Ass'n v. Brannan*, 173 F.2d 57, 66 (2d Cir.), *cert. denied*, 338 U.S. 825 (1949).

Beatrice Foods Company with another division of Beatrice Foods Company. It is a common practice in the milk industry for one plant to buy milk from another plant subject to and conditioned upon the qualification of such milk for pricing under the applicable Federal Order. Such pricing agreements, conditioning the price of milk upon ultimate pricing by the Market Administrator, also extend between a handler and its producers, where appropriate. An example of such a price agreement is referred to in *Lewes Dairy, supra*, 402 F.2d at 312 n.8, which states:

For some time after February 1, 1960 when the Order became effective, Lewes continued to pay its producers the higher Delaware market price subject to an agreement by the producers to refund to Lewes all amounts in excess of the blend prices if Lewes should be unsuccessful in this litigation.

Robert Cashdollar, General Manager of Meadow Gold, testified that although Meadow Gold has not charged back to County Line the Market Administrator's compensatory payment assessments, he did not know of any reason why Meadow Gold could not do so (Tr. 328). When asked why Meadow Gold did not recover from County Line, he replied (Tr. 328):

A. I think that is a business decision, internal side of Beatrice.

Based on that testimony, I infer that Meadow Gold had the typical contract permitting Meadow Gold to adjust the price paid to County Line, as a result of the Market Administrator's audit adjustments.

But even if Meadow Gold had no such contractual arrangement with County Line, that, too, was an internal decision between Beatrice and its divisions. If Meadow Gold did not have such contractual protection, it has itself to blame for any economic disadvantage, rather than the Order provisions.

In this case, it would have been particularly important, in an arms-length transaction, for Meadow Gold to have a contract permitting it to charge back against County Line based upon subsequent audit adjustments because Meadow Gold employees knew that at least in some, or perhaps many, transactions, the milk was not being physically pumped into and out of Meadow Gold's tank, as required by the Order. Hence Meadow Gold was in a position to know that there was a reasonable possibility that the Market Administrator would discover that the supply plant qualification pro-

visions were not being met, and issue audit adjustments accordingly.

The ALJ states in Finding 103, note 28, *supra*:

[A]ssuming *arguendo* that Meadow Gold could recover the excess charges from County Line, then County Line suffers the loss. Could County Line then recover from the producers (farmers)? To whom should the farmer look to be made whole?

The record here does not show what type of contractual arrangement County Line had with the dairy farmers supplying milk to its supply plant. Even if County Line had a contractual provision permitting County Line to recover from the dairy farmers based on the Market Administrator's audit adjustments, the dairy farmers might be able to defend on the ground that they were led to believe that County Line would qualify as a pool plant, and the only reason County Line did not qualify as a pool plant was because County Line and Meadow Gold surreptitiously failed to pump the milk into and out of Meadow Gold's tank, as required for qualification by the Order. The dairy farmers could argue that they should not suffer because of the deliberate choice made by Meadow Gold and County Line to surreptitiously fail to meet the qualification provisions.

In most situations, dairy farmers selling their milk to a nonpool plant would have no right to expect that their milk would be utilized under a Federal Order program in a manner that would permit payment to them on the basis of Class I usage of their milk. But in the particular facts of this case, it is quite likely that the farmers supplying County Line had reasonable grounds for expecting that County Line would meet the pool plant qualification requirements, and that their milk would be utilized in Class I. But we do not need to decide here any issues between County Line and its dairy farmers.

For the foregoing reasons the compensatory payment provision involved here does not conflict with § 8c(5)(G) of the Act.

Turning back to the allocation issue involving 7 CFR § 1049.44, under which producer milk is favored in the allocation provisions over other source milk, it is clear that the allocation provisions do not create a trade barrier prohibited by § 8c(5)(G) of the Act, as interpreted in *Lehigh Valley*. Here, again, it is important to note that the literal language of § 8c(5)(G) is not even relevant to the allocation issue. It is only because the Court held in *Lehigh Valley* that § 8c(5)(G) should be rewritten in view of its legislative history that the issue arises now.

Searching the legislative history of § 8c(5)(G), which is summarized in *Lehigh Valley* (370 U.S. at 91-97), reveals nothing that indicates that the allocation provisions violate § 8c(5)(G).

A simple hypothetical example may serve to clarify the allocation issue. Leaving aside (temporarily) premium prices paid by handlers to "producers" in excess of the blend price, assume that Handler A and Handler B each purchased 200 pounds of milk, and each used 100 pounds for fluid use (Class I) and 100 pounds to manufacture cheese (Class III). Handler A purchased all of his milk from "producers," and Handler B purchased 100 pounds from "producers" 100 pounds of other source milk.

Under the allocation provisions, Handler A would have 100 pounds of "producer" milk classified as Class I and 100 pounds of "producer" milk classified as Class III. Handler B would have 100 pounds of "producer" milk classified as Class I and 100 pounds of other source milk classified as Class III.

Handler A would pay the difference between the Class I price and the blend price into the pool on his 100 pounds of Class I milk, and he would be subsidized by the pool on his Class III milk, *i.e.*, he would draw from the pool the difference between the Class III price and the blend price on his 100 pounds of Class III milk. This subsidy of manufacturing milk purchased from "producers" is essential to the entire pooling arrangement. It enables all handlers to pay all "producers" the blend price, as required by the Order, irrespective of the use actually made of a particular producer's milk, while at the same time, each handler's actual minimum cost is the Class price of the milk that he uses in each Class.

Without this subsidy given to pool handlers using "producer" milk for manufacturing purposes, they could not pay the uniform blend price to "producers," and we would have the situation that existed before the marketing order program existed, under which dairy farmers fought to get their particular milk used in the highest Class uses. This situation has been described as "near-chaos in the distribunal stages of the milk industry, with the concomitant threat to the public health and welfare" (*Titusville Dairy Products Co. v. Brannan*, 176 F.2d 332, 334 (3d. Cir.), *cert. denied*, 338 U.S. 905 (1949)). Under the pooling system, those chaotic conditions ended, since it no longer mattered to a "producer" in the pool how his particular milk was used. But without the payment made to the pool by the handlers using milk for Class I, and the subsidy provided by the pool to the handlers using "producer" milk in Class III, the entire pooling arrangement would fail.

Under the pooling arrangement, the (minimum) cost to Handler A of milk for fluid use is the Class I price; the (minimum) cost to

Handler A of milk used for manufacturing cheese is the Class III price. .

Handler B, in the hypothetical example, would similarly have to pay the difference between the Class I price and the blend price into the pool on the 100 pounds of "producer" milk classified as Class I, so his (minimum) cost for the 100 pounds of "producer" milk used in Class I is the Class I price (the same as Handler A's (minimum) cost for Class I milk).

But since Handler B's Class III milk was other source milk, not entitled to share in the pool, he would not be subsidized on his Class III use of other source milk. That is, he would not be permitted to draw from the pool the difference between the Class III price and the blend price on his 100 pounds of other source milk.

Leaving aside any premium prices paid by Handler A, it is obvious that Handler B is at an economic parity with Handler A only if Handler B paid the Class III price for his other source milk. If Handler B paid more, he is at an economic disadvantage. But the disadvantage, if any, occurs because Handler A is subsidized from the pool on his manufacturing use of "producer" milk (since he is required by the Order to pay his "producers" the blend price), whereas Handler B is not subsidized from the pool on his manufacturing use of other source milk (since he is not required by the Order to pay his dairy farmers the blend price).

Certainly there is nothing in the legislative history of § 8c(5)(G) that indicates that it is a prohibited trade barrier for the Indiana Order to fail to subsidize the manufacturing use of all other source milk imported from anywhere in the country (or, theoretically, from anywhere in the world) by a pool handler.

Imposing a compensatory payment requirement on a handler bringing other source milk into the area (involved in *Lehigh Valley*) is considerably different from merely failing to subsidize a handler who brings other source milk into the area.

Under circumstances slightly different from the original hypothetical example just discussed, if a *portion* of Handler B's other source milk was classified in Class I (as in the present case), *Lehigh Valley* holds that it would be a prohibited trade barrier to force Handler B to subsidize the pool by requiring Handler B to *pay into the pool* a compensatory payment on that portion of his other source milk *classified as Class I, if the compensatory payment is unduly large*.

Lehigh Valley does not hold, or suggest, that, under our original example, it is a prohibited trade barrier for the pool *to fail to subsidize* Handler B for his manufacturing (Class III) use of other source milk imported into the area.

In addition, as stated above, petitioners failed to prove the actual cost of milk to competing handlers in the pool. The record shows that competing handlers were required to pay premium prices, over the blend prices, for milk purchased from cooperatives. But the record does not show the amount of the premiums. Hence petitioners failed to prove that they were actually at a competitive disadvantage, as a result of not receiving a subsidy from the pool on Meadow Gold's other source milk classified as Class III.

Furthermore, as stated above, the prices paid by Meadow Gold to County Line for milk were not in arms-length transactions. And Meadow Gold either had, or should have had, a contractual arrangement permitting appropriate charge backs based on the Market Administrator's audit adjustments.

Finally, as stated above, "federal milk order pricing provisions are not unlawful as violative of uniformity (§ 8c(5)(A)), or as trade barriers (§ 8c(5)(G)), despite economic disadvantage to particular handlers or producers, if they are reasonably related to an authorized regulatory purpose." Vetne, "Federal Marketing Order Programs," in 1 *Agricultural Law* § 2.37 at 129 (J. Davidson ed. 1981).

Here, if there were any economic disadvantage to Meadow Gold because it was not subsidized from the pool on its other source milk used for manufacturing purposes, the disadvantage was reasonably related to the authorized regulatory purpose of determining which dairy farmers should be included as "producers" in the Indiana pool.

For the foregoing reasons, the petition for relief under 7 U.S.C. § 608c(15)(A) of the Act should be dismissed.

ORDER

The relief requested by petitioners is denied and the petition is dismissed on the merits.

In re: UNIVERSITY OF CONNECTICUT. AWA Docket no. 273. Decided January 7, 1985.

Civil penalty, partly suspended—Consent.

Gary Shockley, for complainant

Paul Shapiro, Storrs, Connecticut, for respondent

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This case was commenced by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service according to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, 7 CFR §§ 1.130-51 (1984). The complaint alleged that respondent University of Connecticut had violated the Animal Welfare Act, 7 U.S.C. §§ 2131-56 (1982), and its regulations and standards, 9 CFR §§ 1.1-3.142 (1984). This Decision and Order is entered pursuant to the consent decision provisions of the Rules of Practice. 7 CFR § 1.138.

The respondent specifically admits the jurisdictional allegations of the complaint, but neither admits nor denies the remaining allegations and expressly disclaims liability. The respondent waives the right to a hearing and any further procedures. The parties consent to the issuance of this decision for the purpose of settling this matter.

FINDINGS OF FACT

1. Respondent University of Connecticut is, *inter alia*, a research facility located at Storrs, Connecticut.
2. At all material times, respondent was licensed under the Act as a research facility.
3. Since the time of the alleged violations set out in the complaint, respondent's wolf compound has been renovated and its Agriculture Building has been closed. Respondent has also made substantial repairs to its coydog kennel.

CONCLUSIONS OF LAW

Inasmuch as the respondent has admitted the jurisdictional allegations of the complaint and the parties have agreed to the provisions of the following Order, such Order will be issued. 7 CFR § 1.138 (1984).

ORDER

Respondent, its agents, employees, and assigns, acting directly or indirectly, or through any corporation, trust, or other device what-

soever, shall cease and desist from violating any and all provisions of the Animal Welfare Act, 7 U.S.C. §§ 2131-56 (1982), and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142 (1984).

Respondent is hereby assessed a civil penalty of \$10,000.00. Of this amount, \$5,000.00 shall be permanently suspended in consideration of proof of expenditures by respondent of \$5,000.00 in materials used to improve its animal care facilities in general and its coydog kennel, wolf compound, and rabbit facility in particular. Complainant has acknowledged receipt of proof of the required expenditures.

Another \$2,000.00 of this civil penalty shall be suspended conditioned on respondent's not being cited for a repeat uncorrected deficiency for one year. This sum shall be due and payable without further procedure if such a deficiency is cited within one year after entry of this order and is at any time thereafter adjudged to have been a violation of the Act or regulations and standards. This \$2,000.00 sum shall be in addition to any penalty imposed for the independent violation.

Finally, \$3,000.00 of this civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States and forwarded to counsel for Complainant at the following address: Office of the General Counsel, United States Department of Agriculture, Room 2014-South, Washington, D.C. 20250.

This Decision and Order shall have the same force and effect as a decision entered after a full hearing and shall be effective upon service on respondent.

In re: JOE LEMKE. AWA Docket No. 319. Decided January 10, 1985.

License suspension—Consent.

Andrea Jones, for complainant.
Respondent, *pro se*

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION AND ORDER

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. 2131 *et seq.*). A complaint issued by the administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice was served upon respondent. This Decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR § 1.138).

Respondent admits the jurisdictional allegations of the complaint, specifically admits that the Secretary of Agriculture has jurisdiction in this matter, admits the remaining allegations of the complaint, waives hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding, to the entry of this Decision.

In consideration of the above, complainant agreed to the entry of the following Order:

ORDER

a) Respondent's license is suspended for a period of 30 days and continuing until the facilities are in full compliance with the Act and the regulations and standards under the Act.

b) Respondent agrees to cease and desist from further violation of the Act and the regulations and standards under the Act.

This Order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

n re: Ms. EMAGENE RICHARDS. AWA Docket No. 315. Decided January 15, 1985.

Civil penalty—Consent.

Andrea Jones, for complainant

Respondent, *pro se*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION AND ORDER

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*). A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice was served upon respondent. This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR § 1.138).

Respondent admits the jurisdictional allegations of the complaint, specifically admits that the Secretary of Agriculture has jurisdiction in this matter, admits the remaining allegations of the complaints, waives hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding, to the entry of this Decision.

Respondent further agrees to withdraw completely from the business of selling dogs in commerce and to cease and desist from vio-

lating the Act and the regulations and standards under the Act at such time as respondent may reenter the business.

In consideration of the above, complainant agrees to the entry of the following Order:

ORDER

a) A civil penalty of \$500 is assessed against respondent. Respondent shall send a certified check or money order for that amount payable to the Treasurer of the United States to Andrea Jones, Attorney, Marketing Division, Office of the General Counsel, Room 2014-S, U. S. Department of Agriculture, Washington, D. C. 20250 within 30 days of the effective date of this Order.

b) Respondent is required to cease and desist from violating the Act and the regulations and standards under the Act if respondent reenters the business of selling dogs in commerce.

This Order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

In re: RONALD KIRK, d/b/a KIRK'S KENNEL. AWA Docket No. 312.
Decided January 29, 1985.

Dealer—Compliance with the Act—Civil penalty—Consent.

Mary Hobbie, for complainant.
Respondent, *pro se*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, 7 CFR §§ 1.130-81 (1984). The complaint alleged that respondent, Mr. Kirk, has violated the Animal Welfare Act, 7 U.S.C. §§ 2131-56 (1982), and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142 (1984). This decision is entered pursuant to the consent decision provisions of the Rules of Practice, 7 CFR § 1.138.

The respondent specifically admits the jurisdictional allegations of the complaint. The respondent also admits two of the violations alleged in the complaint which are included in the Findings of Fact (below). The respondent waives the right to a hearing and any fur-

ther procedures. The parties consent to the issuance of this Decision for the purpose of settling this matter.

FINDINGS OF FACT

1. Respondent Ronald Kirk, doing business as Kirk's Kennel, is licensed as a Class A Dealer, with his place of business at R.R. 1, Box 128, Drakesville, Iowa 52552.

2. On February 21, 1984 an inspection revealed that respondent was holding four dogs measuring 31 inches each in a cage which measured 49½ inches by 82 inches. Under the standards, section 3.4 (9 CFR 3.4), the dogs required 5476 square inches of space. The cage in which they were held yielded only 4059 inches of space.

3. On June 6, 1984 an inspection showed that Respondent was holding four dogs measuring 21 inches each in a cage which measured 30 inches x 42 inches. Under the standards, section 3.4 (9 CFR 3.4), the dogs required 1760 square inches of space. The cage in which they were held yielded only 1260 square inches of space.

CONCLUSION

Inasmuch as the respondent has admitted the jurisdictional allegations of the complaint, and the facts set out in the Findings of Fact and the parties have agreed to the provisions of the following Order, such Order shall be issued.

ORDER

Respondent, its agents, employees, and assigns, acting directly or indirectly or through any corporation, trust or other device whatsoever, shall cease and desist from violating any and all provisions of the Animal Welfare Act, 7 U.S.C. §§ 2131-56 (1982), and the regulations and standards issued thereunder, 9 CFR §§ 1.1-3.142 (1984).

Complainant shall send respondent a letter within 30 days of the issuance of this Order, explaining the requirements of Section 3.4(b)(2) (9 CFR 3.4(b)(2)) and the method by which the provisions of that section are administered.

Respondent is hereby assessed a civil penalty of \$300.00 which shall be paid by check or money order to the Treasurer of the United States and shall be sent to Mary Hobbie, Office of the General Counsel, United States Department of Agriculture, Room 1014-South, Washington, D.C. 20250. This Decision and Order shall have the same force and effect as a Decision entered after a full hearing and shall be effective upon service on Respondent.

In re: DELTA AIR LINES, INC. AWA Docket No. 327. Decided January 30, 1985.

Live animal shipment training—Civil penalty—Consent.

*Andrea Jones, for complainant.
Jason R. Archambeau, for respondent.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act. A complaint issued by the Administrator of the Animals and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice was served upon respondent. This decision is entered pursuant to the consent decision provision of the rules of Practice (7 CFR 1.138).

Respondent admits the jurisdictional allegations of the complaint, specifically admits that the Secretary of Agriculture has jurisdiction in this matter, neither admits or denies the remaining allegations of the complaint, waives hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding, to the entry of this decision.

Respondent agrees to make a concerted and continuing effort to educate its employees in the Animal Welfare Act and the regulations and standards issued thereunder and to take all necessary affirmative action to comply fully with the Act and the regulations and standards in its future handling of live animals.

Respondent further agrees to encourage all agents involved in live animal shipments to review and utilize respondent's air cargo training bulletin entitled *Self-Study Module: Live Animal Shipments*, and to spotlight issues, problems, and concerns in respondent's cargo newsletter. To this end, respondent has issued a directive to all directors, station managers and supervisory personnel to assure the training of all agents involved in live animal shipments in the requirements of the Animal Welfare Act, regulations, and standards.

In consideration of the above, complainant agrees to the entry of the following Order:

ORDER

A civil penalty of \$1,000 is assessed against respondent. Respondent shall send a certified check or money order for that amount payable to the Treasurer of the United States to Andrea Jones, Attorney, Marketing Division, Office of the General Counsel, Room 2014-S, United States Department of Agriculture, 1400 Independ-

ence Avenue, S.W., Washington, D.C. 20250, within 30 days of the effective date of this Order.

This Order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

In re: MT. WACHUSETT ANIMAL FOREST CORP., FRANCES APPLEBY and LINDA WEINTRAUB. AWA Docket No. 286. Decided December 19, 1984.

Violations of Act by zoo/animal park owners—Civil penalty—License revoked. Respondents owned and operated a zoo and animal park, under proper license. Eight inspections revealed numerous serious violations of the Act. Respondents failed to bring zoo into compliance. Respondents' license as an exhibitor was revoked and respondents were assessed a civil penalty of \$2,500.00.

Gary Shockley, for complainant.

Frederick Busconi, Natick, Massachusetts, for respondents.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Animal Welfare Act, 7 U.S.C. Sections 2131-56 (1982), instituted by a complaint filed May 16, 1984, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. This complaint alleged that respondents had committed numerous serious violations of the Act and its regulations and standards, 9 CFR Sections 1.1-3.142 (1983).

Due notice was given of the time and place of the oral hearing, which was held in Boston, Massachusetts, on August 2, 3, and 6, 1984, before Administrative Law Judge Dorothea A. Baker, at which time the complainant was represented by Gary Shockley, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC., and the respondents, Frances Appleby and Linda Weintraub, appeared *pro se*. The parties were given the opportunity to file Proposed Findings of Fact, Conclusions, Order, and briefs in support thereof. The complainant filed its brief on October 17, 1984. The respondents have filed none. Through counsel, the respondents, on October 18, 1984, did file a Motion to Re-open Evidence, together with supporting affidavit, which was denied on October 30, 1984. Pursuant to leave granted

therefor, the respondents, through counsel, filed on November 19, 1984, "Respondents' Objections and Offers of Proof".

Because complainant's Proposed Findings of Fact and Conclusions, for the most part, are supported by the record evidence and the record as a whole, and except for minor changes and additions, the complainant's Findings of Fact and Conclusions have been adopted herein, except as otherwise noted.

FINDINGS OF FACT

1. Mt. Wachusett Animal Forest Corporation is a corporation incorporated in the Commonwealth of Massachusetts. Frances Appleby and Linda Weintraub are owners, officers, agents, and employees of the corporation.

2. Respondents are the owners and operators of a zoo and animal park located at Princeton Road, Hubbardston, Massachusetts, 01452.

3. At all material times, respondents were licensed under the Act as an exhibitor.

4. At the time respondents' exhibitor's license No. 14-C-49 was issued, respondents, Appleby and Weintraub, received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A, of the Code of Federal Regulations and agreed to comply with these regulations and standards.

5. A series of eight inspections between July 5, 1983, and April 19, 1984, revealed numerous serious violations of the Act. Despite warnings to correct these violations, respondents, although making some improvements, failed to bring their zoo into compliance with the Act.

6. Inspections on February 21, 1984, and April 19, 1984, revealed that the Mt. Wachusett Animal Forest violated the Act and standards in that:

(a) a sufficient number of adequately trained employees and a supervisor with a background in animal care were not employed;

(b) although respondents had sought the services of veterinarians, there was no program of adequate veterinary care;

(c) enclosures for blackbuck, white tail deer, fallow deer, mouflon, coyote, and black bear were not maintained in good repair so as to protect the animals from injury and to contain them;

(d) the lion and fox enclosures were not kept clean and in good repair;

(e) food storage and preparation areas were not properly cleaned so as to prevent vermin infestation, contamination, odors, and disease hazards;

(f) the dump area contained mounds of used hay mixed with feces, animal carcasses, bones, and animal parts, in proximity to grain and hay storage areas;

(g) primate cages were not cleaned often enough to prevent accumulation of feces and food;

(h) interior surfaces of primate cages were not substantially impervious to water;

(i) although no injury had occurred under respondents' ownership, lions and other animals were housed and handled in such a manner as to place both the animals and the public in grave danger;

(j) a muntjac was confined in a cage that did not provide sufficient space to allow freedom of movement and normal postural and social adjustment;

(k) the deer and guanaco pens were not equipped with a suitable method of drainage to rapidly eliminate excess water; and

(l) coin-operated public feeding machines contained moldy food.

7. The testimony of respondents' witnesses and the record evidence as a whole negates the complainant's charges that the mountain lions and other carnivores were not provided with a proper diet; that the lions were not provided adequate space to allow freedom of movement and normal postural and social adjustments; and that records were not maintained as required by the regulations and standards.

CONCLUSIONS

By reason of the Findings of Fact set out above, respondents have violated sections 3.82, 3.132, 3.84, 3.134, 3.125, 3.131, 3.75, 3.81, 3.76(d), 3.135, and 3.127 of the Regulations. These violations warrant the issuance of the Order set forth herein.

The complainant alleges numerous violations of the Animal Welfare Act, and the standards and regulations issued pursuant thereto, and complainant has proven same except for the three charges mentioned in Finding of Fact No. 7, *supra*.

This is a sad situation—the two ladies who are the owners are obviously animal lovers and would not intentionally do anything to harm the animals or the public. The *bona fides* of their intentions are not questioned. The evidence adduced at the hearing tends to indicate that they may have had a different approach to zoo keeping than is routinely accepted and recognized.

It appears that the desire to protect a lion cub from abuse and/or death led to the purchase of the Mt. Wachusett zoo by two well educated, but inexperienced persons, who had intended to rely, for the first six months, upon past personnel of the zoo. The amount of

work and the enormity of the task, plus lack of trained personnel, and funds, have all been contributing factors in the areas of "deficiencies" found by the inspectors. The safety and well being of the animals, the owners themselves, and the public have all been taken into consideration in ordering a revocation of the respondents' license.

The intent of Congress in enacting the Animal Welfare Act, 7 U.S.C. Sections 2131-56 (1982), was:

1. to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
2. to assure the humane treatment of animals during transportation in commerce; and
3. to protect the owners of animals from theft of their animals by preventing the sale or use of animals which have been stolen.

7 U.S.C. Section 2131. To achieve these goals, Congress found it was "essential to regulate . . . the transportation, purchase, sale, housing, care, handling, and treatment of animals . . . by persons or organizations engaged in using them . . . for exhibition purposes." *Id.* Congress authorized the Secretary of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." *Id.* Section 2143(a). The Secretary has exercised this authority by promulgating the regulations and standards set out at 9. CFR Sections 1.1-3.142 (1984).

In the present case, evidence adduced at the hearing proved that respondents had violated the applicable regulations.

As set forth herein, the record clearly shows that the respondents violated the Animal Welfare Act, and the standards and Regulations issued thereunder. With respect to certain allegations of the complaint, the respondents have contested the validity thereof, and, to the extent that the Agency has not borne its burden of proof, the controverted allegations have not been found to be violations.

The record is equally clear that the violations which did occur were not the result of not caring for the animals and their safety and well being, nor of neglectful or wanton acts, but rather were the result of inexperience and the inability of the individual respondents to run a zoo. This is recognized by the complainant when it states that respondents "lacked the means and expertise to run a zoo and that they became the owners and operators of the zoo

almost by accident";—"respondents were not familiar with professional standards in zookeeping and were not capable of training lay volunteers"—that the Respondents "demonstrated their ignorance of the most basic principles of animal care"—. These and other acknowledgements by the complainant recognize that the respondents lacked the ability to manage and maintain such a facility, despite their use of volunteer workers, and the expenditure of their own funds to keep the animals fed.

Except for the three alleged violations set forth in Finding of Fact No. 7, the respondents have not offered proof to disprove the allegations of the Complaint.

In fact, respondent Appleby testified that "we do not find any objection with . . . what [U.S.D.A. inspectors] have seen with their eyes and the pictures they have taken on the times they have been there." Tr. 147.

The proof presented by respondents suggests two possible defenses. Respondents' witnesses John Smith and Sandra Lewis both suggested that respondents had been treated differently than the park's prior owner, Harvey Ellowitz. The testimony of Officer Peter Oberton, however, was that "I can't remember getting any complaints there at all" under the previous owner. The evidence of record suggests that some of the many inspections which took place after purchase by the respondents were the result of complaints. In addition, the final inspection report at the zoo before its sale to respondents characterized it as a "well run, well managed" zoo. Ex. 22. The uncontradicted proof clearly shows that the zoo is anything but well-run and well-managed under the current ownership. In any event so long as the regulations were properly applied to respondents, the Department's position is that they have no standing to complain that they have not been applied to others. *Dairyman's League Coop. Ass'n v. Brannan*, 173 F.2d 57 (2d Cir.), cert. denied, 338 U.S. 825 (1949); *In Re Aldovin Dairy, Inc.*, ____ Ag. Dec. ____ (AWA Docket No. M 2-71, decided November 15, 1983). Finally, respondents' witness Smith testified that the regulations, in his opinion, "do not give you anything definite and they leave it to the inspector's prerogative to decide which way he will go." Tr. 212. Even if this point was arguably well-taken in some instances, it has no application when there is, as in the present case, definite and uncontradicted evidence of objective conditions that never came close to the minimum standards required by the regulations. As was pointed out in *In Re Radzilowski*, 35 Ag. Dec. 1718 (1976), "Even assuming the published standards are premised on subjective opinion as opposed to objectively determined criteria, the remedy there-

for lies within the discretion of the legislature or pertains to administrative policy." *Id.* at 1727.

Respondents' witnesses' testimony indicates that there is less than unanimous agreement as to both the requirements of the regulations, and the past and then current condition of the zoo facility. Several witnesses testified on behalf of the respondents. Mr. Pap indicated that on an inspection by Mr. Christian and Dr. Smith, when Mr. Pap accompanied Respondent Weintraub, Dr. Smith indicated that the deficiencies were minor and correctable. Tr. 190. He further testified to the many improvements which the respondents made (Tr. 191), and as to their sincerity as respects care for the animals.

A most impressive witness was Mr. John Smith, a professional zoo man of 16 years experience, in the capacity from lecturer, assistant director of the children's zoo, supervisor of zoological operations at the Stone Zoo, and a general curator at the Benson's Animal Park. He became acquainted with the respondents several months after they had purchased the zoo. His testimony emphasized that the rules and regulations being applied to the respondents' facility are often subjective in nature and depend upon the judgment determination of the inspectors involved. The testimony of this witness was most persuasive and was from one who has knowledge of, and who had worked around animals. It further indicated a compassion and understanding for the welfare of animals on the part of respondents. His testimony reflected that different owners of animals may have different ideas as to what is best for the animals. Mr. Smith explained that in zoo parks there are deaths within the zoos which are unexplainable; that the lion cage at Mt. Wachusett was proper and superior to that used by circuses, and that when officials were asked for the required measurements for a lion's cage, they could not give such specifications; that the mixing of animal species could be a desirable and social thing among animals making for greater happiness among animals under the circumstances he described; the non-necessity for a shelter for the white tailed does; that there has never been a time when Mr. Smith believed the animals at Mt. Wachusett zoo were not adequately fed; and, that the efforts of the respondents in keeping the animals in a natural type of situation made for a happier animal. In the event this case is appealed, it is suggested that the testimony of Mr. John Smith be reviewed in its totality. (Tr. 197-235). It represents testimony from one who is experienced and knowledgeable of the every day workings of zoos.

An additional witness testifying on behalf of the respondents was Ms. Lewis whose testimony indicated that the animals were provid-

ed with exceptionally nutritious food, and that the level of care given the animals was one of concern and responsiveness to their needs. She indicated that the respondents used a different dimension in running the zoo, and that there is a difference between an amusement park zoo and an educational one. Tr. 249. Ms. Lewis also indicated a concern for the purpose for which animals are held in captivity. She believed that the animals at Mt. Wachusett were loved, respected, and cared for.

The Government has the burden of proof, and indeed has submitted convincing evidence to support its position, but the evidence with respect to lack of food has been successfully controverted by the respondents' witnesses, as well as the matter concerning dead animals, the cages for the lions and the matter of record keeping. In view of the testimony of respondents' witnesses, mere assertions on the part of complainant are not sufficient proof.

Respondents made bona fide efforts to obtain the service of a qualified zoo keeper, as part of their purchase transaction. The son of the former owners had agreed to stay and render services for a period of six months after the purchase and sale. In anger, he quit and left. Thereafter, respondents employed a Mr. Roth, who was approved by the United States Department of Agriculture, and, he left. Tr. 140-141.

The irony of the situation is that the respondents sought to enhance the quality of life for the zoo animals, but were unable to carry out their desire.

At the oral hearing, the complainant recognized that " * * * this case involves two people who sincerely love exotic animals but who, quite simply and quite sadly, are not capable of maintaining a zoo in compliance with the Animal Welfare Act." (Tr. 14).

This brings us to the matter of sanctions. When Congress enacted the Laboratory Animal Welfare Act in 1966, it empowered the Secretary to summarily suspend a dealer's license for up to twenty-one days, to suspend or revoke licenses after notice and opportunity for a hearing, and to issue cease and desist orders. P.L. 89-544, 80 Stat. 350 Section 19(a), 89th Cong., 2d Sess. (1966). Section 20(a) provided for a civil penalty of up to \$500 for research facilities that "knowingly" violated a cease and desist order. *Id.* Section 20(a). When this legislation was amended in 1970 to become the Animal Welfare Act, the penalty section was strengthened to provide for a civil penalty of \$500 for dealers who "knowingly" violated a cease and desist order. P.L. 91-579, 84 Stat. 1560 Section 20, 91st Cong., 2d Sess. (1970). In 1976, Congress again amended the Act to strengthen the Secretary's enforcement powers. In the

Animal Welfare Act Amendments of 1976, Congress provided for a civil penalty of up to \$1,000 for dealers in violation of the Act or any of the rules and regulations promulgated by the Secretary under the Act. P.L. 94-279, 90 Stat. 417 Section 13, 94th Cong., 2d Sess. (1976). The 1976 amendment to section 19 of the Act was intended to "impose a *uniform civil penalty provision* on all persons regulated under the statute and eliminate the requirement . . . that the Secretary issue a cease and desist order before seeking imposition of a civil penalty." [emphasis added] H. Rep. No. 94-801, 94th Cong., 2d Sess. (1976). *reprinted* in [1976] U.S. Code Cong. & Ad. News 758, 759 (1977). As this legislative history of the penalty provisions of the Act shows, Congress has been concerned from the beginning that the Secretary have sufficient power to impose effective sanctions.

The Judicial Officer, acting as the Secretary's delegate, has determined sanction policy for the Secretary for disciplinary cases arising under the Animal Welfare Act and similar statutes. As set forth in *In Re Esposito*, 38 Ag. Dec. 613 (1979), that policy is to assess severe sanctions for even a first serious violation of the Act. This policy is intended to deter both the individual respondent and other persons subject to regulation in order to achieve the remedial purposes of the Act. See *In Re Christ*, 35 Ag. Dec. 195 (1976); *In Re Worsley*, 33 Ag. Dec. 1547 (1974). Under this policy, the sanction recommended by the administrators of the regulatory program, though not controlling, is entitled to "great weight" because of their experience with the program and expertise in determining the penalty necessary to achieve general deterrence. See *In Re Miller*, 41 Ag. Dec. 2134 (1982); *In Re Esposito*, 38 Ag. Dec. 613 (1979); *In Re Breeders, Inc.*, 36 Ag. Dec. 1650 (1977).

The Animal Welfare Act sets out four factors to be considered in determining a proper sanction for violations of the Act and its regulations and standards. These are "the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." 7 U.S.C. Section 2149(b)(1982). The proof adduced at the hearing shows that Mt. Wachusett Animal Forest was a "medium range zoo" in size, Tr. 61, and that it housed fifty-five animals at the time it was licensed as an exhibitor. Ex. 4. Although not comparable to large municipal zoos, it is clear from this proof, that the park was larger than a small business. However, with funds exhausted and the zoo no longer open to the public, it hardly constitutes any business at all at the present time.

The gravity of respondents' violations was made clear by Dr. Sedgwick's testimony about his fears for the safety of both animals

and humans at the park, Tr. 22-24, Ex. 1, and by Officer Oberton's testimony that he would not inspect the park alone. Tr. 52. In addition, the inspection reports document numerous instances of unlocked cages and other grave violations. Ex. 13, 15-19. The effect of those violations was evident from escaped animals from the park. Tr. 324. The uncontradicted evidence proved that respondents committed many violations that endangered their animals, their staff, and the public.

The third factor to be considered is "the person's good faith". Good faith has been defined by complainant as faithfulness to duty.

The record as a whole shows that there was no careless disregard of the Regulations or of the licensing requirements by respondents. Respondents purchased the zoo in good faith, believing that it complied, and would continue to comply, with the requirements of the Animal Welfare Act for a license. Once ownership changed and within one month, the first inspection showed numerous pages of deficiencies, many of which had obviously pre-existed the purchase, Tr. 135, 136, and had been officially sanctioned for a long time, Tr. 136.

Both individual respondents indicated a desire to attend classes in order to educate themselves relative to zoos and animals. They sought the services of a well known and qualified veterinarian, Dr. Sedwick, Tr. 33, 34, as well as other qualified people. Due to the efforts of respondents, and the hiring of a qualified zoo director, the facility was in complete compliance in April, 1983. Tr. 67.

Despite the many deficiencies reflected in the investigatory reports, Mr. Onuparik, in January 19, 1984, believed that the animals were receiving basic food, water, and shelter, Tr. 89, 90, and, in September, 1983, Dr. Sedwick observed no signs of malnourishment among the carnivores. Tr. 33.

Additionally, the Secretary is directed by 7 U.S.C. Section 2149(b) to consider prior violations in determining a proper sanction. Respondents have no record of prior violations.

The record contains persuasive evidence adverse to the respondents on the gravity of their violations, but not as to the other three of the four factors to be considered in determining a sanction for violations of the Animal Welfare Act. Giving "due consideration", 7 U.S.C. Section 2149(b), to the size of respondents' business which is not now operating, to the gravity of their violations, and to their honest and good faith efforts to comply, even though they lacked the ability to do so, the Cease and Desist Order and revocation of respondents' license as requested by the complainant is appropriate, reasonable, and necessary to deter others from similar violations and to achieve the remedial purposes of the Act. In Re: *Espo-*

sito, 38 Ag. Dec. 613 (1979); *In Re: Worsley*, 33 Ag. Dec. 1547 (1974). However, the imposition of the monetary sanction, in the amount requested by complainant, is not warranted.

In an Order entered August 9, 1984, counsel for complainant was requested to research and report on sanctions imposed in prior cases under the Animal Welfare Act.

The Administrative Law Judge wishes to thank Mr. Schockley for the data set forth in Appendix A to the complainant's Brief, which is helpful to both respondents and to the Judge, and which is attached to this Decision as Appendix A.

Since the Judicial Officer has held that consent Decisions are not relevant precedent for determining sanctions under the Animal Welfare Act, *In Re: Esposito*, 38 Ag. Dec. 613 (1979), only Decisions and Orders issued after an adjudicatory hearing are included in the following discussion.

The Judicial Officer has held that, "insofar as practicable, the sanctions imposed under a regulatory Act against comparable violators for comparable violations should be reasonably uniform." *In Re Worsley*, 33 Ag. Dec. 1547, 1568 (1974). He has also made it clear, however, that "uniformity must yield to effectiveness" and that "a respondent has no inherent right to a sanction no more severe than that applied to others." *Id.* 1569. With these principles in mind, it may be helpful to explore other contested cases under the Act involving numerous serious violations.

Of the 193 reported decisions under the Animal Welfare Act, 132 are consent decisions. As noted earlier, the Judicial Officer has held that these consent decisions have no precedential value. *In Re Esposito*, 38 Ag. Dec. 613 (1979). Of the remaining decisions, eighteen are orders of voluntary dismissal or other miscellaneous orders. Of the forty-three full decisions, at least eleven were handed down prior to the extensive 1976 amendments to the Animal Welfare Act's penalty provisions. Thus, there have been thirty-two reported decisions and orders decided under the current Act. These cases and the penalties imposed in each are set out in Appendix A, and represent complainant's synopsis thereof.

As the Judicial Officer has stressed in many decisions, the penalty recommended by the Administrators charged with enforcing a regulatory statute is entitled to deference because of the administrators' experience and expertise. See e.g., *In Re Esposito*, 38 Ag. Dec. 613 (1979); *In Re Worsley*, 33 Ag. Dec. 1547 (1974). He has also made it clear that the goal of uniformity must yield to the goal of deterrence. *In Re Worsley*, 33 Ag. Dec. 1569. In addition, "an agency is free to reconsider sanctions previously imposed without prior notice." *Id.* at 1570. Complainant states that the Administra-

tor of the Animal and Plant Health Inspection Service has begun to *request larger penalties* in Animal Welfare Act cases in order to achieve deterrence. *See, e.g. In Re Gentle Jungle, Inc.* (AWA Docket No. 271) (\$30,000 civil penalty, revocation, cease and desist order); *In Re Green* (AWA Docket No. 308) (\$18,000 civil penalty, cease and desist order); *In Re Stuekerjuergen* (\$15,000 civil penalty, 90-day suspension, cease and desist order). However, none of these cases has yet been decided. Such action is within the discretion given the Administrator by the Act and is an entirely proper means of carrying out the will of Congress as expressed in the Animal Welfare Act.

Because this is a case brought pursuant to the provisions of the Administrative Procedure Act; three charges were not proven; and with a view to fairness in determining when the goal of uniformity yields to the goal of deterrence, the Administrative Law Judge believes that the Administrator and/or the Judicial Officer should have the opportunity to determine, on the record as a whole whether or not the strict sanction policy and deterrence have already been achieved through the issuance of a cease and desist order and the revocation of respondent's license. *No case* reported in appendix A reflects a civil penalty of \$10,000, and no case has been decided upholding such monetary penalty.

Applying the most stringent of monetary penalties of the 32 decided cases, and to achieve the purpose of the Act, a monetary penalty of \$2,500 far exceeds that of other penalties and such amount is warranted to be the proper penalty in this case.

The following Order shall issue:

ORDER

Respondents, their agents, employees, successors, and assigns, acting directly or indirectly, or through any corporation, partnership, trust, or other device whatsoever, shall cease and desist from violating any and all provisions of the Animal Welfare Act, 7 U.S.C. Sections 2131-56 (1982), and the Regulations and Standards issued under the Act. 9 CFR Sections 1.1-3.142 (1984).

Specifically, respondents shall cease and desist from:

(a) failing to employ a sufficient number of adequately trained employees and a supervisor with a background in animal care in accordance with 9 CFR Sections 3.82 and 3.132;

(b) failing to establish a program of adequate veterinary care in accordance with 9 CFR Sections 3.84 and 3.134;

(c) failing to maintain enclosures for black-buck, white tail deer, fallow deer, mouflon, coyote, and black bear in good repair so

as to protect the animals from injury and to contain them in accordance with 9 CFR Section 3.125;

(d) failing to keep lion and fox enclosures clean and in good repair in accordance with 9 CFR Sections 3.125 and 3.131;

(e) failing to properly clean food storage and sanitation areas so as to prevent vermin infestation, contamination, odors, and disease hazards in accordance with 9 CFR Sections 3.75 and 3.125;

(f) failing to dispose of used hay mixed with feces, animal carcasses, bones, and animal parts so as to minimize vermin infestation, odors, disease hazards, and danger of contamination of food in accordance with 9 CFR Sections 3.75 and 3.125;

(g) failing to clean primate cages often enough to prevent accumulation of feces and food in accordance with 9 CFR Section 3.81;

(h) failing to construct and maintain primate cages with interior surfaces substantially impervious to water in accordance with 9 CFR Section 3.76(d);

(i) failing to house and handle lions and other animals so as to minimize risk of harm to the public, the handler, and the animals in accordance with 9 CFR Sections 3.125 and 3.135;

(j) failing to provide a muntjac cage with sufficient space to allow freedom of movement and normal postural and social adjustments in violation of 9 CFR Section 3.128;

(k) failing to equip the deer and guanaco pens with a suitable method of drainage to rapidly eliminate excess water in accordance with 9 CFR Section 3.127; and

(l) failing to supply public feeding machines with food that is wholesome, palatable, and free from contamination in accordance with 9 CFR Section 3.129.

Respondents are hereby assessed a civil penalty of \$2,500, for which they shall be jointly and severally liable. This civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States and forwarded to counsel for the Complainant at the following address: Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C., 20250.

Respondent's license as an exhibitor under the Animal Welfare Act is hereby revoked.

All contentions, requests, motions, and otherwise of the party litigants have been considered carefully. To the extent not ruled upon and to the extent of being inconsistent with this Decision, they are hereby overruled and denied.

This Decision and Order shall become effective 35 days after service thereof, unless appealed to the Secretary within 30 days, as

provided in the Rules of Practice and Procedure 7 CFR Section 1.131, *et seq.*

[This Decision and Order became final February 1, 1985.—Ed.]

[Appendix omitted.—Ed.]

In re: HENRY H. KNUDSEN, d/b/a KNUDSEN'S. AWA Docket No. 330.
Decided February 4, 1985.

Dealer—License permanently suspended—Civil penalty—partly suspended—
Consent.

Robert Ertman, for complainant.

Randy E. Thomas, Stockton, California, for respondents

Decisions by John A. Campbell, Administrative Law Judge.

CONSENT JUDGMENT

This is a proceeding under the Animal Welfare Act, as amended (7 USC 2131 *et seq.*), and the regulations and standards issued pursuant to the Act.

A complaint issued by the Administrator of the Animal and Plant Health Inspection Service was served upon respondent. This consent judgment is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR 1.138).

By his amended answer, respondent admits that:

1. Henry H. Knudsen, d/b/a Knudsen's, hereinafter referred to as respondent, is an individual whose mailing address is 12488 South Harlan Road, Lathrop, California 95330.

2. At all times material herein respondent was licensed under the Act as a Class B dealer.

3. At the time respondent's license was issued and annually thereafter, respondent received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A of the Code of Federal Regulations and agreed to comply with said regulations and standards.

4. On November 1, 1984, respondent's premises were inspected and found to be in the following condition:

The animals at the facility had been deprived of food and water. There were 18 dead dogs and 19 dead cats which had died of starvation and dehydration. Further, 69 dogs and 18 cats were found in an emaciated and dehydrated condition, and in need of veterinary care. Further, none of the animals were individually identified as required.

Complainant and respondent consent to the issuance of the following order:

ORDER

1. Respondent's license as a dealer under the Act is permanently suspended; further, respondent shall not engage in any activities regulated by the Act, whether or not a license would be required.

2. Respondent shall cease and desist from any violation of the Act or the regulations and standards issued under the Act.

3. Respondent is assessed a civil penalty of one-hundred and twenty-four thousand dollars (\$124,000) of which all but ten thousand (\$10,000) is suspended, conditional upon compliance with the terms of this Order.

The civil penalty shall be paid from the proceeds of Escrow number 236643, Safeco Title Co., 4612 McGaw Street, Stockton, California 95204, provided that, in the event of the failure of the sale, payment shall be made thirty (30) days after demand.

The civil penalty shall be by check, payable to the order of the Treasurer of the United States and sent to Robert A. Ertman, Attorney for Complainant, United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, Washington, D.C. 20250.

This Order shall have the same force and effect as if entered after full hearing and shall be effective upon service on respondent.

In re: JUDY GRAY, DICK W. PIRKEY and SHARON DOGA. AWA Docket No. 227. Decided February 6, 1985.

Decision re Judy Gray, dealer—Operating without a license—Compliance with the Act—Civil penalty—Consent.

Gregory Cooper, for complainant.

Stephen V. Hartman, Dallas, Texas, for respondents.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

[By Judy Gray.—Ed.]

This is a proceeding under the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), hereinafter referred to as the Act, and the regulations and standards issued pursuant to the Act. It was instituted by a complaint filed on January 27, 1983, by the Acting Administrator, Animal and Plant Health Inspection Service, pursuant to the Act

and the applicable Rules of Practice (7 CFR 1.133(b)(1)). This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR 1.138).

Respondent Judy Gray specifically admits the jurisdictional allegations of the complaint, but neither admits nor denies the remaining allegations of the complaint. Respondent Judy Gray waives the right to a hearing and any further procedures in this matter. Respondent Judy Gray and the complainant consent to the issuance of this decision for the purpose of settling this proceeding.

FINDINGS OF FACT

1. Judy Gray, hereinafter referred to as the respondent, is an individual whose address is 817 High School Drive, Seagoville, Texas 75179.

2. Respondent Judy Gray, at all times material herein, was engaged in business as a dealer within the meaning of section 2 of the Act (7 U.S.C. 2132) buying, transporting and selling dogs in commerce.

3. From August 11, 1981, until June 12, 1984, respondent Judy Gray was not licensed in any capacity under the Act.

CONCLUSIONS

Inasmuch as the respondent Judy Gray has admitted the jurisdictional allegations of the complaint and the respondent Judy Gray and the complainant have agreed to the provisions set forth in the following Order in disposition of this proceeding against Judy Gray, such Order will be issued.

ORDER

Respondent Judy Gray, her agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from failing to comply with the requirements of the Act and the regulations and standards thereunder including, but not limited to, the requirements of the Act and the regulations concerning the buying, transporting, and selling of animals without a license.

Respondent Judy Gray is assessed a civil penalty of \$1,200 which shall be paid by certified checks or money orders made to the order of the Treasurer of the United States and which shall be forwarded to Gregory Cooper, Office of the General Counsel, United States Department of Agriculture, Room 2014, South Building, Washington, D.C. 20250. The civil penalty of \$1,200 may be paid in 12 monthly installments of \$100 each. The first such installment must be received within 30 days from the date that this Order becomes effective and each succeeding installment must be received within

30 days of the previous installment. If any installment payment is not timely received, the complainant, without any further procedure or delay, may suspend the dealer license of respondent Judy Gray for one year and thereafter until the entire civil penalty has been received. Any such suspension shall in no way bar an appropriate civil action for the collection of the unpaid installments.

The sanctions and penalties contained in this Order shall not preclude the institution of any administrative, civil, or criminal action against Judy Gray for violations of the Act, or the regulations or standards thereunder, occurring after the effective date of this Order.

This Decision shall have the same force and effect as a decision entered after a full hearing and shall be effective upon service on respondent Judy Gray.

In re: OTAKAR BEROUSEK, a/k/a OTTO Berosini. AWA Docket No. 241. Decided February 13, 1985.

Civil penalty—Consent.

Robert A. Ertman, for complainant.
Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This is a proceeding under the Animal Welfare Act, as amended. A complaint issued by the Administrator of the Animal and Plant Health Inspection Service pursuant to the Act and the applicable Rules of Practice was served upon respondent. This Decision is entered pursuant to the consent Decision provision of the Rules of Practice (7 CFR 1.138).

Respondent admits the jurisdictional allegations of the complaint, specifically admits that the Secretary of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations of the complaint, and waives hearing and further procedure herein. Complainant and respondent consent to the issuance of this Order.

ORDER

Respondent is assessed a civil penalty of \$500. A certified check or money order for this amount, payable to the Treasurer of the United States shall be sent to: Robert A. Ertman, Attorney, Office of the General Counsel, Room 2014-South Building, United States

Department of Agriculture, Washington, D.C. 20250, within 30 days of the effective date of this order. Further, respondent is ordered to cease and desist from violating the Animal Welfare Act, as amended, and the regulations and standards issued under the Act.

This Order shall have the same force and effect as if entered after a full hearing and shall be effective upon service upon respondent.

In re: MARLIN U. ZARTMAN d/b/a GILBERTSVILLE SALES STABLES.
AWA Docket No. 259. Decided February 27, 1985.

Dismissal of complaint.

The Judicial Officer affirmed Judge Baker's order dismissing the complaint, but for different reasons than those given by Judge Baker. Complainant sought a \$2,000 civil penalty, a cease and desist order, and a 60-day suspension order for various violations of the Animal Welfare Act. Although the issue is not free from doubt, the Secretary is authorized to promulgate standards applicable to the operator of an auction sale as to the care, treatment, housing feeding, watering, and sanitation of animals. No clause of a statute should be construed as superfluous. The proven violations relating to inadequate lighting, soundness of cages, and size of cages are to trivial to warrant a sanction. The allegation as to failure to establish and maintain a veterinary care program is dismissed because respondent had such a program, even though it was not perfect. Perfection is not required by the regulations. Nothing in the standards prohibits watering receptacles with chipped edges. A licensee is responsible for acts of his employees. Parties are permitted and encouraged to introduce evidence indicating why the violations involved are serious, but complainant introduced no such evidence here.

Robert A. Ertman, for complainant

Dennis L. O'Connell, Gilbertsville, Pennsylvania, for respondent.

Dorothea A. Baker, Administrative Law Judge

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and standards issued thereunder (9 CFR § 1.1 *et seq.*). On December 19, 1984, Administrative Law Judge Dorothea A. Baker (ALJ) issued an initial decision and order dismissing the complaint.

On February 19, 1985, complainant, seeking a \$2,000 civil penalty, a cease and desist order, and a 60-day license suspension order, appealed to the Judicial Officer, to whom final administrative au-

thority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).¹

Based upon a careful consideration of the entire record, I believe that the complaint should be dismissed, but for different reasons than those expressed by the ALJ.

FINDINGS OF FACT

1. Marlin U. Zartman, d/b/a Gilbertsville Sales Stables, is an individual whose mailing address is Marlin U. Zartman, 355 Tolegate Road, Douglassville, PA 19519.

2. At all times material herein, respondent was an operator of an auction sale under the Animal Welfare Act, as amended, and was licensed under the Animal Welfare Act, as amended, as a Class B dealer.

3. At the time respondent's license No. 23 CE was issued on May 31, 1972, respondent received a copy of the regulations and standards contained in Title 9, Chapter 1, Subchapter A, of the Code of Federal Regulations and agreed to comply with said regulations and standards.

4. On February 26, 1983, respondent's premises were inspected and found to be in the following condition:

A. In an area under respondent's bleachers where dogs were held, no light was installed, and insufficient lighting existed to permit proper, routine inspections. This condition was also noted in an inspection on December 18, 1982.

B. Some primary enclosures (cages) were not structurally sound and maintained in good repair in that some cages holding rabbits had wire ends sticking inside, rusty floors, or missing parts of the backs. This condition was also noted in an inspection on December 18, 1982, as were similar conditions involving some cages holding dogs, cats, and guinea pigs.

C. One primary enclosure (consisting of two cages combined) holding four puppies did not allow sufficient space for the animals to make normal postural adjustments. A similar condition was noted in an inspection on December 18, 1982, involving two cages for rabbits.

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

CONCLUSIONS

I. Jurisdiction

At the outset, respondent raises a serious question as to whether the Secretary is authorized to promulgate standards applicable to the operator of an auction sale as to the care, treatment, housing, feeding, watering, and sanitation of animals. Section 12 of the Act provides (7 U.S.C. § 2142):

§ 2142. Humane standards and recordkeeping requirements at auction sales

The Secretary is authorized to promulgate humane standards and recordkeeping requirements governing the purchase, handling, or sale of animals, in commerce, by dealers, research facilities, and exhibitors at auction sales and by the operators of such auction sales. The Secretary is also authorized to require the licensing of operators of auction sales where any dogs or cats are sold, in commerce, under such conditions as he may prescribe, and upon payment of such fee as prescribed by the Secretary under section 2153 of this title.

If § 12 of the Act is read by itself, no serious question is presented as to the Secretary's authority. That is, the authority given to the Secretary to promulgate humane standards governing the "handling" of animals by operators of auction sales would clearly authorize the standards at issue here.

In addition, the Secretary is authorized by § 12 of the Act to license the operators of auction sales where dogs or cats are sold "under such conditions as he may prescribe." Dogs and cats are sold at respondent's auction, and the Secretary has prescribed that auction operators must comply with the standards for other animals subject to the Act, as well as dogs and cats (9 CFR § 2.100(a)). That is, one of the conditions the Secretary has prescribed is (9 CFR § 2.100(a)):

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and research facility shall comply in all respects with the standards set forth in Part 3 of this subchapter setting forth the standards for the humane handling, care, treatment, and transportation of animals. . . .

The "standards set forth in Part 3 of this subchapter" are the standards that are involved in this case (9 CFR § 3.1 *et seq.*). Hence, pursuant to the authority in § 12 of the Act, the Secretary has pre-

scribed broad and exacting standards, applicable to all animals subject to the Act, that must be complied with by auction operators.

The legislative history of the Animal Welfare Act of 1970, which added the provisions as to auction operators, states as to § 12 (H.R. Rep. No. 91-1651, 91st Cong., 2d Sess. 11 (1970)):

Section 13.—This section [*i.e.*, § 12 of the Act] would also authorize the Secretary to license the operators of auction sales, where any dogs or cats are sold and such sales are affecting commerce. In addition, the section would extend the recordkeeping and standards of humane handling under the Act to the purchase, handling, and sale of animals, as defined in the bill, rather than only dogs or cats, at auction sales by dealers, research facilities, exhibitors and by the operators of the auction sales.

Hence it would appear from the literal language of § 12 and its legislative history that § 12 gives the Secretary broad authority to impose on auction operators standards of humane handling of all animals subject to the Act.

The ambiguity in this case arises when § 12 of the Act, quoted above, is read in conjunction with § 13 of the Act, which does not expressly apply to auction operators.² Section 13 provides (7 U.S.C. § 2143(a)):

§ 2143. *Humane standards for animals transported in commerce*

(a) *Authority of Secretary to promulgate standards*

The Secretary shall promulgate standards to govern the humane *handling, care, treatment*, and transportation of animals by dealers, research facilities, and exhibitors. Such standards shall include minimum requirements with respect to *handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care*, including the appropriate use of anesthetic, analgesic or tranquilizing drugs, when such use would be proper in the opinion of the attending veterinarian of such research facilities, and separation by species when the Secretary finds such separation neces-

² As noted by complainant, the Department has consistently construed the term "dealer" to include "auction operators." However, to say the least, some ambiguity arises from the fact that § 12 of the Act applies, *inter alia*, to "dealers" and "operators of such auction sales," whereas § 13 applies expressly to "dealers," but not to operators of auction sales.

sary for the humane handling, care, or treatment of animals. The Secretary shall also promulgate standards to govern the transportation in commerce, and the *handling, care, and treatment* in connection therewith, by intermediate handlers, air carriers, or other carriers, of animals consigned by any dealer, research facility, exhibitor, operator of an auction sale, or other person, or any department, agency, or instrumentality of the United States or of any State or local government, for transportation in commerce. The Secretary shall have authority to promulgate such rules and regulations as he determines necessary to assure humane treatment of animals in the course of their transportation in commerce including requirements such as those with respect to *containers, feed, water, rest, ventilation, temperature, and handling*. (Emphasis added.)

In § 13 of the Act, quoted immediately above, it would appear that the word "handling" is used in a manner that does not include "care," "treatment," "housing," "feeding," "watering," "sanitation," "ventilation," "veterinary care," and "shelter from extremes of weather and temperatures." To construe the word "handling" in § 13 of the Act as broad enough to include all of such other terms would make the additional terms in § 13 surplusage. "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Ex Parte Public Nat'l Bank of NY*, 278 U.S. 101, 104 (1928).

Nonetheless, this is remedial legislation "to insure that animals . . . are provided humane care and treatment" (7 U.S.C. § 2131(1)), and it has been the settled and contemporaneous construction of the Act by the administrative officials charged with the responsibility for achieving the congressional purpose that the Secretary has authority to impose on auction operators the standards involved in this proceeding. Although the issue is not free from doubt, I believe that the Secretary acted within his statutory authority.

II. Respondent's Violations

A. Inadequate Lighting

The Standards provide (9 CFR § 3.2(c)):

(c) *Lighting*. Indoor housing facilities for dogs or cats shall have ample light, by natural or artificial means, or

both, of good quality and well distributed. Such lighting shall provide uniformly distributed illumination of sufficient light intensity to permit routine inspection and cleaning during the entire working period. Primary enclosures shall be so placed as to protect the dogs or cats from excessive illumination.

Complainant's witnesses testified that in an area under respondent's bleachers where dogs were held, no light was installed and they were forced to use flashlights to inspect the dogs. There is no evidence to the contrary. In fact, respondent conceded that there was no light in that area at the time of the inspection. He testified (Tr. 160):

Q. NOW, YOU HEARD THE TESTIMONY THAT THERE WAS NO LIGHT IN THE AREA UNDER THE BLEACHERS AT THE TIME OF THE VISIT BY DOCTOR SANZ. IS THAT CORRECT?

A. THAT'S CORRECT.

Q. DID YOU SUBSEQUENTLY HAVE A LIGHT INSTALLED IN THAT AREA?

A. YES. IMMEDIATELY AFTER HER LAST INSPECTION THERE WAS TWO FEDERAL INSPECTORS CAME DOWN TO CHECK IT AND OKAYED IT.

Accordingly, the undisputed evidence proves that respondent violated the lighting standard, as alleged in the complaint.

Although the ALJ concluded that respondent did not violate the lighting standard, her findings show clearly that the lighting standard was violated. Specifically, the ALJ found (Initial Decision at 7-9):

15. The evidence in this proceeding is that there were no cats held under the bleachers but that there were dogs under the bleachers which bleachers were sealed in to assure the safety of the dogs. The prior inspector, Dr. Moore, advised Respondent to put dogs there. The cages used under the bleachers were of a mobile nature. At the time of the inspection, none of the investigators asked that the mobile cages be moved out and they did inspect the area with flashlights. Although at the time of Dr. Sanz's investigation, February 26, 1988, there was no light under the bleachers, the Respondent subsequently had a light installed in order to satisfy Dr. Sanz's criticism. At the time of the inspections by the government inspectors, they were

given free access to go under the bleachers and look at the animals and the government inspectors carried flashlights with them. The dogs were held there for only a short time. The Complaint does not allege and the evidence does not indicate that the animals under the bleachers were in any way mistreated; the crux of the alleged violation was that there was no light. The Regulations and Standards do not specifically require a light. It is noted that most human beings spend part of a 24 hour period in the dark (when they are asleep) and without having any specific requirement for a light, this does not constitute a violation of the Regulations and Standards. It is not known whether airlines and railroads are required to have lights in their transportation facilities for animals. However, it is noted that the Respondent has sought to be fully cooperative with the government inspectors, and when this matter was brought to his attention, he did install a light.

16. Dr. Sanz also admitted that she was able to see the animals in this area for inspection purposes through use of a flashlight. It was established that the animals were in mobile cages, but that neither Dr. Sanz or Kenneth Swartz, the APHIS Compliance Officer, who accompanied her on February 26, 1983, requested auction personnel to roll out the cages to get a better look at them. Mr. Swartz further admitted that there was nothing wrong with keeping dogs in the area under the bleachers so long as light was provided.

17. It was established, through photographic evidence, that lighting was subsequently installed in the area in question.

18. Respondent testified, without contradiction, that no federal inspector, prior to the visits by Dr. Sanz in December, 1982 and February 1983, had ever told him that he had to install lights under the bleachers. That fact is also reflected by the earlier APHIS inspection sheets relating to Respondent's facility. No violation of 9 CFR 3.2 has been shown.

Although as noted by the ALJ, the regulations and standards "do not specifically require a light," they specifically require "ample light, by natural or artificial means, or both, of good quality and uniformly distributed," which "shall provide uniformly distributed illu-

mination of sufficient light intensity to permit routine inspection and cleaning" (9 CFR § 3.2(c)). That standard was clearly violated.

However, the record indicates that this was not a serious violation. There is no indication that the requirement for adequate lighting is to prevent the animals from experiencing fear or stress, but, rather, to permit adequate inspection and cleaning. Moreover, the violation was not regarded as of sufficient importance to warrant mentioning by a number of Department inspectors.

B. Soundness of Primary Enclosures (Cages)

The Standards provide as to primary enclosures (cages) (9 CFR § 3.4, .28, .53):

§ 3.4 *Primary enclosures.*

All primary enclosures for dogs and cats shall conform to the following requirements:

(a) *General—(1) Requirements for primary enclosures for dogs and cats.* (i) Primary enclosures shall be structurally sound and maintained in good repair to protect the dogs and cats from injury, to contain them, and to keep predators out.

* * * * *

§ 3.28 *Primary enclosures.*

All primary enclosures for guinea pigs and hamsters shall conform to the following requirements:

(a) *General.* (1) Primary enclosures shall be structurally sound and maintained in good repair to protect the guinea pigs and hamsters from injury.

* * * * *

§ 3.53 *Primary enclosures.*

All primary enclosures for rabbits shall conform to the following requirements:

(a) *General.* (1) Primary enclosures shall be structurally sound and maintained in good repair to protect the rabbits from injury, to contain them, and to keep predators out.

The undisputed evidence shows that on December 18, 1982, and February 26, 1983, some of respondent's cages had wire ends sticking inside, rusty floors, or missing parts of the backs. There is no evidence that any animals were injured as a result of this deficien-

cy, but there was a slight possibility (but not a real likelihood) of injury.

The undisputed evidence also shows that respondent was attempting in good faith to maintain the structural soundness of his cages, that some persons had broken into some of the cages in order to remove animals, that he was in the process of repairing the cages, and, in fact, had sufficient sound cages by the time of the second inspection that all of the animals subject to the Act could have been housed in sound cages. Respondent had instructed his employee to place the animals involved here in sound cages, but due to employee error, some of the animals subject to the Act were placed in unsound cages. That employee was subsequently removed from his position.

Considering all of the evidence in this case, including photographic evidence, the violations of this standard were trifling in nature.

C. Size of Primary Enclosures (Cages)

The Standards provide (9 CFR § 3.4(b), .53(b)):

(b) *Space requirements*—(1) *Dogs and cats*. Primary enclosures shall be constructed and maintained so as to provide sufficient space to allow each dog and cat to turn about freely and to easily stand, sit and lie in a comfortable normal position.

* * * * *

(b) *Space requirements*. Primary enclosures shall be constructed and maintained so as to provide sufficient space for the animal [*i.e.*, rabbit] to make normal postural adjustments with adequate freedom of movement.

The evidence shows that on December 18, 1982, two cages for rabbits did not permit the rabbits to make normal postural adjustments with adequate freedom of movement, and on February 26, 1983, one enclosure (consisting of two cages combined) holding four puppies was not quite large enough to permit the animals to make normal postural adjustments.

The evidence, including photographs of the enclosure holding the four puppies, indicates that the enclosures did not quite meet the space requirements, but that the space was adequate to prevent any serious inconvenience or stress to the animals.

D. Veterinary Care

The Standards provide (9 CFR § 3.10):

§ 3.10 *Veterinary care*.

(a) Programs of disease control and prevention, euthanasia, and adequate veterinary care shall be established and maintained under the supervision and assistance of a doctor of veterinary medicine.

The evidence shows that respondent established and maintained a program of disease control and prevention under the supervision and assistance of a doctor of veterinary medicine. Dr. John Patt, a veterinarian licensed by the State of Pennsylvania, attends every sale at respondent's auction. No animals are held overnight at respondent's auction, which is held every Saturday beginning at 7:00 p.m. Most animals arrive Saturday afternoon after 3:00 p.m., although some animals arrive Saturday morning. Dr. Patt arrives at about 4 o'clock or 4:30 p.m. every Saturday and checks each animal for any symptoms of sickness. If an animal has any symptoms of sickness, he tags the cage so that the animal will not be sold, and the animal is returned to the owner.

Complainant contends that respondent violated the veterinary care standard because several sick cats were accepted for sale by respondent's employee on February 26, 1983, and several sick dogs and cats were accepted for sale on December 18, 1982. There is no contention by complainant that Dr. Patt would not have detected such animals during his routine examination prior to sale, but complainant contends that respondent's employee should not have accepted the animals in the first place.

Respondent had instructed his employee not to accept any sick animals and, after learning that this employee had accepted several sick animals, respondent removed him from that position.

Complainant apparently believes that the program of disease control and prevention established and maintained by an auction operator must be perfect, at least insofar as preventing the receipt of any animal which could be diagnosed by a layman as sick. However, the standard is not drafted in terms of perfection. No requirement of excellence or perfection is expressed in the standard. Assuming that the rule of reason can be read into the standard, it is not unreasonable for an employee occasionally to miss a few animals that should have been rejected, particularly where a veterinarian later checks each animal to insure that no sick animal will be sold.

If complainant wants to require perfection in the exclusion of animals that could be determined to be sick by a layman, complainant will have to rewrite the standard to impose such a requirement. As long as the regulation merely requires that a program of disease control and prevention be established and maintained under the supervision and assistance of a doctor of veteri-

nary medicine, where, as here, such a program is established in good faith, no violation will be established merely by proof that an employee inadvertently received a few sick animals (which presumably would have been detected by the veterinarian).

Even if the regulation were rewritten, as referred to above, the violations in this case would have been regarded as trivial.

E. Chipped Edges on Water Receptacles

The Standards provide (9 CFR § 3.6):

§ 3.6 *Watering.*

If potable water is not accessible to the dogs and cats at all times, potable liquids shall be offered to such animals at least twice daily for periods of not less than 1 hour, except as might otherwise be required to provide adequate veterinary care. Watering receptacles shall be kept clean and shall be sanitized at least once every 2 weeks.

Complainant contends that this standard was violated, or, in the alternative, that the standards relating to facilities (9 CFR § 3.1) or primary enclosures (9 CFR § 3.4) were violated, because on February 26, 1983, several watering receptacles for dogs and cats had sharp, chipped edges.

However, there is nothing in 9 CFR § 3.1, .4, or .6 that expressly, or by implication, prohibits watering receptacles with chipped edges. Perhaps the standards should be amended to impose such a requirement. But in view of the detailed and extensive nature of the standards that have been promulgated, additional requirements cannot be added by implication.

Here, again, even if the standards were rewritten, as referred to above, the violations in this case would have been regarded as trivial.

III. No Sanction Should Be Imposed

The Act provides for license suspension or revocation, cease and desist orders, and civil penalties for violations of the regulations or standards. Specifically, the Act provides (7 U.S.C. § 2149):

§ 2149. *Violations by licensees*

(a) *Temporary license suspension; notice and hearing; revocation*

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or

regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$1,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. *The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.* (Emphasis added.)

Complainant instituted a formal complaint against respondent because the violations detected on December 18, 1982, were not eliminated by February 26, 1983.³

However, the violations detected on both dates were of a trivial nature, not posing any serious threat to the well-being of the ani-

³ In determining whether violations occurred and what sanctions should be imposed for violations, the licensee is responsible for the acts of his employees. *In re Esposito*, 38 Agric. Dec. 613, 621 (1979).

mals. Respondent has been in the animal auction business for about 32 years, and, except for the trivial violations involved here, respondent had a long, unblemished record of compliance with federal and state requirements applicable to his animal auction. There is nothing in this record that indicates the need for any type of disciplinary order as to respondent for the trivial violations found here.

Parties involved in disciplinary proceedings before this Department are not only permitted, but encouraged, to introduce evidence indicating why the violations involved in a particular proceeding are serious, and the type of disciplinary order that is warranted in the particular proceeding.⁴ Complainant introduced no such evidence. In addition, the testimony and photographs in this case fail to reveal any serious violations warranting the imposition of a sanction. Accordingly, the complaint should be dismissed.

ORDER

The complaint is dismissed with prejudice.

In re: JAMES and JULIA STUEKERJUERGEN, d/b/a CORNER VIEW KENNELS. AWA Docket No. 265. Decided February 27, 1985.

Appropriateness of sanctions imposed for violations—Sanctions increased in severity—License suspension—Civil penalty.

The Judicial Officer reversed Judge Baker's order assessing a \$2,000 penalty and suspending respondent's license for 15 days for violating the minimum age requirement as to shipping puppies, and increased the sanction to a \$7,000 civil penalty and a 35-day suspension. Violation of the minimum age requirement is a serious violation of the Animal Welfare Act. The fact that this is the first adjudicated com-

⁴ *In re Peterman*, 42 Agric. Dec. ____ (Dec. 12, 1983), *appeal docketed*, No. 84-1053 (10th Cir. Jan. 13, 1984); *In re Hatcher*, 41 Agric. Dec. 662, 669 n.3 (1982); *In re Rowland*, 40 Agric. Dec. 1934, 1950 n.9 (1981), *aff'd*, No. 82-3015 (6th Cir. July 13, 1983); *In re King Meat Co.*, 40 Agric. Dec. 1910, 1919 (1981) (order denying reopening), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *appeal docketed*, No. 82-6029 (9th Cir. Nov. 12, 1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 416 (1980); *In re Esposito*, 38 Agric. Dec. 613, 656-63 (1979); *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 177 n.6 (1978); *In re Loretz*, 36 Agric. Dec. 1087, 1096 (1977); *In re Christ*, 35 Agric. Dec. 195, 203 n.8 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1854-55 (1975); *In re Speight*, 33 Agric. Dec. 280, 310-13 (1974); *In re Miller*, 33 Agric. Dec. 53, 80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974); *In re Professional Commodity Serv., Inc.*, 32 Agric. Dec. 585, 586-91 (remand order), *second remand order*, 32 Agric. Dec. 592 (1973), *final decision*, 33 Agric. Dec. 14 (1974); *In re Andrews*, 32 Agric. Dec. 553, 579 (1973); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 75 n.20, *reconsideration denied*, 31 Agric. Dec. 843, 847-50 (1972); *In re American Nut Purveyors, Inc.*, 30 Agric. Dec. 1542, 1596 n.39 (1971).

plaint filed under this particular section of the Act does not lead to a reduced sanction. The administrative recommendation to impose a sanction more severe than imposed here seems more Draconian than "severe."

Gary Shockley, for complainant

M. M. Phelan, Ft. Madison, Iowa, for respondent.

Dorothea A. Baker, Administrative Law Judge

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and standards issued thereunder (9 CFR § 1.1 *et seq.*). On December 19, 1984, Administrative Law Judge Dorothea A. Baker (ALJ) issued an initial Decision and Order directing respondents to cease and desist from violating the Act and regulations, assessing a civil penalty of \$2,000, and suspending respondents' license for 15 days.

On January 22, 1985, complainant, seeking a \$7,500 civil penalty and a 60-day license suspension order, appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 CFR § 2.35).¹ The case was referred to the Judicial Officer for decision on February 26, 1985.

Respondents concede that during the period October 12, 1982, through December 21, 1982, on 10 occasions they shipped a total of 75 dogs under 8 weeks of age, in violation of the regulations, which provide (9 CFR § 2.130):

§ 2.130 *Minimum age requirements.*

No dog or cat shall be delivered by any person to any carrier or intermediate handler for transportation, in commerce, except to a registered research facility, unless such dog or cat is at least eight (8) weeks of age and has been weaned.

The only issue on appeal relates to the appropriate sanction to be imposed for these violations. The Act provides for license suspension or revocation, cease and desist orders, and civil penalties for

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

violations of the regulations or standards. Specifically, the Act provides (7 U.S.C. § 2149):

§ 2149. *Violations by licensees*

(a) *Temporary license suspension; notice and hearing; revocation*

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) *Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order*

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$1,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. *The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's*

good faith, and the history of previous violations. (Emphasis added.)

Respondents are one of the largest dog brokers in the State of Iowa. They reported gross income from the sale of animals of \$432,723.26 for their 1982 business year. (However, respondents had a net loss of about \$30,000 in 1982.)

Violation of the minimum age requirement is a serious violation of the Act. The 8-week minimum age requirement is based on "scientific data . . . [that] indicates that a puppy's familiarity with the environment and association with man occurs between five and eight weeks of age and that this conditioning to the normal environment determines the animal's ability to function in its adult environment." 42 Fed. Reg. 31,022, 31,023-24 (1977). Thus the minimum age requirement is based on a finding by the Secretary that shipment of dogs under 8 weeks of age adversely affects "the animal's ability to function in its adult environment," and is, therefore, inhumane. (The Secretary found that "major producers of puppies already observe the eight week minimum age requirement within their industry" and that "many States have regulations which prohibit dogs and cats less than eight weeks of age from entering their States" (*id.* at 31,024)).

Respondents' violations are also serious and flagrant in view of the large number of puppies (75) shipped on 10 different occasions during a 2-month period in violation of the regulation.

The ALJ found that there "has been discrepancy by the compliance officers in various sections of the country as to the interpretation of how the age of puppies is computed, and when a puppy can be shipped to meet the eight week old requirement" (Finding 19, Initial Decision at 8). This finding is based on the testimony of respondent Julia Stuekerjuergen that "other dealers" had told her that their compliance officers counted the day of birth as the first day in determining a puppy's age or counted the time of receipt by the retail pet shop, after shipment by the dealer, as the 56th day (Tr. 245-46). It was clear from her testimony, however, that her compliance officer never misled her about how a dog's age should be calculated (Tr. 246-47, 255). Even if respondents were given the benefit of both of these misinterpretations, it would only add 2 days to the age of the dogs (Tr. 256-57), and would leave 63 (Tr. 257) or 70 violations (Appendix A to Complainant's Original Brief).²

² Four of the dogs involved here were 42 days old, 3 were 44 days old, 2 were 45 days old, 1 was 47 days old, 7 were 48 days old, 15 were 49 days old, 10 were 50 days old, 7 were 51 days old, 14 were 52 days old, 7 were 53 days old, and 5 were 54 days old.

The ALJ found that "[t]here is no regulation under the Animal Welfare Act that requires a Class B dealer to obtain the whelp date of the puppies in writing prior to the shipping of those puppies" (Finding 21, Initial Decision at 9). However, 9 CFR § 2.75(a)(1)(iv)(c) requires dealers to keep records showing date of birth, if known, and 9 CFR § 2.79 requires health certificates prior to shipment. As Earl Stuekerjuergen acknowledged, these certificates certify that the dogs to be shipped are 8 weeks of age (Tr. 294-95). Finally, the requirements of 9 CFR § 2.130 are clear. If respondents choose to act before they have information necessary to be sure they are not violating the law, they voluntarily assume the risk that the dogs may not be 8 weeks of age. Such "careless disregard of these simple requirements" is not a mitigating factor. *See In re Stuekerjuergen*, 36 Agric. Dec. 964, 969 (1977).

The ALJ states (Initial Decision at 9-10):

24. There are mitigating circumstances in this case that have been considered, i.e.:

A. That Corner View Kennels has done business with Johnny J. Wood, d.b.a PJ's Pet Farm for approximately four years.

B. That seventy-one of the seventy-five dogs involved in the violations above referred to, were purchased from Johnny J. Wood, d.b.a PJ's Pet Farm.

C. That Johnny J. Wood, d.b.a PJ's Pet Farm, is a licensed Class B dealer under the Animal Welfare Act. A Complaint filed July 11, 1984, AWA Docket No. 294, charged said Johnny J. Wood with violations of the Animal Welfare Act [relating to animals not involved in this case].

D. That the Respondents have purchased a considerable number of puppies from Johnny J. Wood, d/b/a PJ's Pet Farm, over the period of approximately four years.

E. That due to the long-standing relationship between these Respondents and Johnny J. Wood, there has developed a mutual trust whereby the Respondents herein did not question Johnny J. Wood with regard to the whelp dates of the seventy-one puppies purchased from him, and assumed that any puppies that were delivered to their

place of business by said Johnny J. Wood, were, of necessity, eight weeks of age, for the reason that Johnny J. Wood, being a Class B licensed holder, would be bound by the same rules governing the shipping age of puppies that bound the Respondents herein.

However, the ALJ ignores two crucial points. First, 9 CFR § 2.130 only prohibits delivery of a dog or cat under 8 weeks of age by any person "to any carrier or intermediate handler for transportation, in commerce." Mr. Wood testified that he personally transported dogs to Corner View Kennels, or one of his employees transported them, or one of respondents' employees transported them (Tr. 279). In delivering dogs to Corner View Kennels, Mr. Wood did not deliver them to a "carrier or intermediate handler." Licensed dealers, such as respondents and Mr. Wood, are expressly excluded from the definition of an intermediate handler set out at 7 U.S.C. § 2132(i) and 9 CFR § 1.1(bb). Accordingly, respondents had no basis for assuming that dogs delivered to them by Mr. Wood were 8 weeks old since the regulation, 9 CFR § 2.130, did not apply to the transfer of dogs from Mr. Wood to respondents.

Second, the ALJ's reliance on this "mitigating" factor ignores the settled principle that the legal duties imposed by the Animal Welfare Act are personal and nondelegable. *See In re Esposito*, 38 Agric. Dec. 613, 621 (1979).

The ALJ states (Initial Decision at 8):

20. Any sanction imposed is going to be a deterrent to other Class B dealers for the reason that this is the first adjudicated complaint filed under this particular section of the Animal Welfare Act and other dealers are watching it and are very aware and concerned about it.

However, this fact would not lead to a reduced sanction but, rather, illustrates the need for a sanction that will serve as an effective deterrent to future violations not only by respondents, but by other dealers.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's sanction policy is set forth at great length in numerous decisions, e.g., *In re Worsley*, 33 Agric.

Dec. 1547, 1556-71 (1974),³ set forth in the Appendix to this decision.⁴ The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

In addition, the Secretary is directed by 7 U.S.C. § 2149(b) to consider prior violations in determining a proper sanction. Respondents were found to have violated the Act and standards on a prior occasion, relating to other matters, and their license was suspended for 12 days. *In re Stuekerjuergen*, 36 Agric. Dec. 964, 970 (1977). A second adjudicated violation merits a more severe sanction than a first offense. 7 U.S.C. § 2149(b); *In re Radzilowski*, 35 Agric. Dec. 1718, 1720-21 (1976); *In re Christ*, 35 Agric. Dec. 195, 201-02 (1976).

Although great weight is given to the recommendations by administrative officials as to the sanction (Appendix at 20a-21a), the administrative recommendation here appears to be more Draconian than "severe". Considering all of the circumstances in this case, the following order should be issued.

ORDER

Respondents, their agents, employees, successors, and assigns, acting directly or indirectly, or through any corporation, partnership, trust, or other device whatsoever, shall cease and desist from shipping dogs in violation of 9 CFR § 2.130 and shall cease and

³ The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

⁴ Severe sanctions issued pursuant to this policy were sustained, e.g., in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd*, 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v Bergland*, 570 F.2d 701 (8th Cir. 1978) *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 487; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

desist from violating any and all other provisions of the Animal Welfare Act, 7 U.S.C. §§ 2131-56 (1982), and the regulations and standards issued under the Act. 9 CFR §§ 1.1-3.142 (1984). I11Respondents are hereby assessed a civil penalty of \$7,000, which shall be paid within 30 days after service of this order by certified check or money order payable to the Treasurer of the United States and forwarded to counsel for complainant, Gary C. Shockley, Esq., at the following address: Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250.

Respondents' license as a dealer under the Animal Welfare Act is hereby suspended for a period of 35 days.

The cease and desist provisions of this Order shall become effective on the day after service of this Order. The suspension provisions shall become effective on the 30th day after service of this Order.

APPENDIX

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).
[Excerpt omitted.—Ed.]

In re: Bob Smith A.Q. Docket No. 85. Decided January 8, 1985.

Brucellosis—Civil penalty—Consent.

Joseph Penbroke, for complainant.

Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Bob Smith, respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*) The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegation in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in the proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDING OF FACT

1. Bob Smith, respondent, is an individual whose mailing address is West Plains, Missouri, 65775.

2. On or about September 6, 1984, respondent moved two brucellosis exposed bulls from West Plains, Missouri to East St. Louis, Illinois.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of the proceeding, such Order will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars (\$500) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon respondent.

In re: SALVATORE VILLARI and VILLARI TRUCKING COMPANY d/b/a S & J VILLARI LIVESTOCK COMPANY. A.Q. Docket No. 118. Decided January 8, 1985.

Mark Dopp, for complainant.

Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown, Complainant's motion to dismiss the complaint on the grounds that prosecution is no longer warranted to effectuate the purposes of the program is *granted*.

In re: ASC AIR CARGO SERVICES, INC. A.Q. Docket No. 22. Decided January 10, 1985.

Overseas exportation of horses—Civil penalty—Consent.

Sally Lorang, for complainant.

Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Acts of August 30, 1890, as amended (1890 Act) and February 2, 1903, as amended,

(1903 Act) (21 U.S.C. §§ 104, 105, 111, 120 and 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that ASC Air Cargo Services, Inc., respondent, violated the Acts and regulations promulgated thereunder (9 CFR § 91.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. ASC Air Cargo Services, Inc., respondent, is a corporation organized and incorporated in the state of New York, with corporate headquarters located at 175-01 Rockaway Boulevard, Jamaica, New York 11434.

2. On or about June 10, 1983, the respondent moved or caused to be moved from Dallas, Texas, through Atlanta, Georgia, to a port of embarkation at Jamaica, New York, four horses.

3. On or about June 11, 1983, the respondent exported or offered for exportation from J. F. Kennedy International Airport, Jamaica, New York, to Milan, Italy, four horses.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent ASCS Air Cargo Services, Inc., such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of four hundred and fifty dollars (\$450). The respondent shall send a certified check or money Order for \$450, payable to the "Treasurer of the United States," to Sally M. Lorang, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C., 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: DELL HALL and STEVEN W. ULLOM, D.V.M. A.Q. Docket No. 24. Decided January 11, 1985.

Interstate transportation of cattle—Civil penalty—Consent.

Kris Ikejiri, for complainant.

Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

DECISION AS TO DELL HALL

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. § 111, § 120 and § 122) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondents violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*) Respondent Dell Hall and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Dell Hall admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Finding of Facts set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Dell Hall also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Dell Hall, respondent, is an individual whose mailing address is Route 7, Hulbert, Oklahoma 74141.

2. On or about April 21, 1983, respondent Dell Hall moved interstate from Hulbert, Oklahoma to Cody, Wyoming, 10 cattle.

CONCLUSIONS

Respondent Dell Hall having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Dell Hall is assessed a civil penalty of six hundred dollars (\$600) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422 So. Bldg., United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: ANTONIO SILVA, CARLOS SILVA, and OLINDA SILVA, d/b/a
ROCKY HILL FARM. A.Q. Docket No. 121. Decided January 11,
1985.

Fed garbage to swine—stored garbage in uncovered containers not leakproof—
Civil penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION AS TO CARLOS SILVA

This proceeding was instituted under the Swine Health Protection Act, as amended (Act) (7 U.S.C. § 3801 *et seq.*) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Antonio Silva, Carlos Silva, and Olinda Silva, d/b/a, Rocky Hill Farm, violated the Act and regulations promulgated thereunder (9 CFR § 166.1 *et seq.*). Respondent Carlos Silva and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent Carlos Silva admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reason or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Carlos Silva also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access of Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

3. Complainant agrees to drop all charges against Antonio Silva and Olinda Silva that were alleged in complaint for this proceeding.

FINDINGS OF FACT

1. Carlos Silva, respondent, doing business as, Rocky Hill Farm, is an individual whose mailing address is 242 Orms St., Providence, Rhode Island 02908.

2. On or about January 25, 1984, the respondent fed garbage to swine.

3. On or about January 25, 1984, the respondent permitted untreated garbage to be stored in containers that were not covered and leakproof.

4. On or about January 25, 1984, the respondent allowed untreated garbage into the swine feeding area.

CONCLUSIONS

Respondent Carlos Silva having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Carlos Silva is assessed a civil penalty of one thousand fifty dollars (\$1,050.00) which shall be payable to the "Treasury of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C. 20250, within (30) days from the effective date of this Order.

This Order shall become effective on the day this Order is served upon the respondent.

In re: THOMAS W. HORNER, JR. A.Q. Docket No. 20. Decided January 22, 1985

Interstate transportation of cattle—Brucellosis—Civil penalty—Default judgment. The Judicial Officer ruled on questions certified by Judge Weber that the complaint alleges enough facts to support a default judgment. The allegation that cows were moved interstate without being accompanied by the "required" certificate and permit alleges, by implication, that cows were over 24 months of age. Separate \$500 civil penalties can be assessed for failing to have (i) an inspection certificate, and (ii) a permit for entry.

Thomas Bundy, for complainant.
Respondent, *pro se*
William J Weber, Administrative Law Judge

Decision by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTIONS

This is an administrative proceeding for the assessment of civil penalties for violating the regulations governing the interstate movement of cattle (9 CFR § 78.1 *et seq.*).

Judge Weber certified to the Judicial Officer the question as to whether the complaint is legally valid, and, if not, whether it could be supplemented by a motion for a default decision.

If the complaint were not legally sufficient, it could not be supplemented, for the purposes of a default decision, by a motion reciting additional facts. However, the fact in question, as to whether the two cows are "both over 24 months of age," is adequately alleged in the complaint, by implication. The complaint alleges:

II

On or about June 10, 1983, the respondent moved two (2) cows interstate from Trenton, Tennessee, to Rector, Arkansas, in violation of section 78.9(c)(3) of the regulations, in that the cows, which were moved interstate from a Class B state other than for immediate slaughter or to a quarantined feedlot, were moved interstate unaccompanied by a certificate, as required.

III

On or about June 10, 1983, the respondent moved two (2) cows interstate from Trenton, Tennessee to Rector, Arkansas, in violation of section 78.9(c)(3) of the regulations, in that the cows, which were moved interstate from Class B state other than for immediate slaughter or to a quarantined feedlot, were moved interstate unaccompanied by a permit for entry, as required.

Since the complaint alleges that the cows were moved in violation of § 78.9(c)(3) of the regulations without a certificate and permit, "as required," and such certificate and permit would not have been required if the cows were non-vaccinates under 18 months of age, or vaccinates under 24 months of age, the allegations in the complaint, reasonably construed, allege that the cows were old enough that a certificate and permit were required.

Judge Weber also certifies the question as to whether a separate \$500 civil penalty can be assessed against respondent for (i) failing to have his cattle tested for brucellosis and have an official certifi-

cate to that effect accompany the shipment, and (ii) failing to have a "Permit for Entry" accompany the shipment. Since these are two separate violations, each very serious, the proposed \$500 civil penalty per violation is authorized, and is very modest.

In re: GENE WHEELER, A.Q. Docket No. 28. Decided December 7, 1984.

Interstate transportation of cattle—Brucellosis—Civil penalty.

Respondent bought cattle over two years of age in Alabama and moved them to Georgia without obtaining an official health certificate or permit for entry. Respondent was assessed civil penalties of \$1,000.00.

Thomas Bundy, for complainant.

Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Cattle Contagious Diseases Act of February 2, 1903, as amended (Act), (21 U.S.C. §§ 111 and 120 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that respondent violated Section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)) promulgated under the Act.

Copies of the Complaint and Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent on January 19, 1984.

On June 6, 1984, a Motion to Assign a Date for Oral Hearing was served upon respondent. On August 9, 1984, a Notice of Time and Place of Oral Hearing was served upon respondent, informing respondent that an oral hearing would be held on October 23, 1984, in Atlanta, Georgia, regarding A.Q. Docket No. 28. Respondent failed to appear at the October 23, 1984, oral hearing. Accordingly, respondent is deemed to have waived the right to an oral hearing.

Counsel for complainant, Thomas E. Bundy, Esq., and Mark D. Dopp, Esq. of the Office of General Counsel, United States Department of Agriculture, elected to proceed with testimony and the production of evidence under section 1.141(e) of the Rules of Practice (7 CFR § 1.141(e)). Three witnesses testified on behalf of the complainant, and eight exhibits were admitted into evidence. By failing to appear at the oral hearing, after due notice thereof, the respondent is deemed to have admitted the facts presented at the October

23, 1984, oral hearing. A careful review of the evidence presented at the oral hearing, and the record as a whole, indicates that the Findings of Fact, Conclusions, and Order requested by the complainant in this case are appropriate and warranted.

The material allegations of fact contained in the complaint, which are admitted by respondent's failure to appear at the oral hearing, and which are fully supported by the evidence of record, are adopted and set forth below as findings of fact.

This Decision and Order, therefore, is issued pursuant to Sections 1.141(e) and 1.139 of the Rules of Practice, applicable to the proceeding (7 CFR §§ 1.141(e) and 1.139).

FINDINGS OF FACT

1. Gene Wheeler, respondent, is an individual whose address is Route 1, Canton, Georgia 30114.

2. On or about April 18, 1983, the respondent bought eight head of cattle over two years of age at the Jackson County Stockyard in Scottsboro, Alabama.

3. On or about April 18, 1983, the respondent moved said cattle from Scottsboro, Alabama, a Class B state, to the State of Georgia.

4. The respondent failed to obtain an official health certificate to accompany the cattle from Alabama to Georgia in violation of Section 78.9(c)(3) of the regulations (9 CFR 78.9(c)(3)).

5. The respondent failed to obtain a permit for entry to move the cattle from Alabama to Georgia in violation of Section 78.9(c)(3) of the regulations (9 CFR § 78.9(c)(3)).

6. Brucellosis is a dangerous and highly contagious disease which can affect domestic livestock and man, with very severe results.

CONCLUSIONS

By reason of the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Congress has found that the prevention of the introduction and dissemination of contagious, infectious or communicable diseases of livestock is necessary to protect the domestic livestock industry. Therefore, the following Order is issued.

ORDER

Gene Wheeler is hereby assessed a civil penalty of one thousand dollars (\$500 per violation), which shall be payable to the "Treasurer of the United States" and shall be sent to Thomas E. Bundy, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the date this Order becomes effective. This

Order shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final January 22, 1985.—Ed.]

In re: ANTONIO SILVA, CARLOS SILVA, and OLINDA SILVA, d/b/a ROCKY HILL FARM. A.Q. Docket No. 121. Decided January 24, 1985.

Kris Ihejiri, for complainant.

Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

Complainant moves to dismiss the Complaint without prejudice, as to Antonio Silva and Orlinda Silva, because "of newly discovered evidence."

IT SHOULD BE AND HEREBY IS ORDERED that the Complaint is dismissed without prejudice as to Antonio Silva and Orlinda Silva.

In re: C. R. SCOTT & Co. INC. A.Q. Docket No. 48. Decided January 25, 1985.

Interstate transportation of brucellosis-exposed calves—Brucellosis—Civil penalty.

Cynthia Koch, for complainant.

Drayton N. Hamilton, Montgomery, Alabama, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that C.R. Scott & Co., Inc., respondent, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. C. R. Scott & Co., Inc., is a corporation whose mailing address is P.O. Box 2532, Montgomery, Alabama 36105.

2. On or about May 24, 1983, respondent caused the interstate movement of at least one brucellosis-exposed calf from Chipley, Florida, to Montgomery, Alabama.

3. On or about January 2, 1983, respondent caused the interstate movement of at least one brucellosis-exposed calf from Montgomery, Alabama, to Chester, New York.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of five hundred dollars (\$500.00) which shall be payable to the "Treasurer of the United States", by certified check or money order and which shall be forwarded to Cynthia A. Koch, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day this Order is served upon the respondent.

In re: WILLIAM "Ed" WOOD. A.Q Docket No. 82. Decided January 25, 1985.

Interstate transportation of cattle--Brucellosis—Finding for cause of action.

The Judicial Officer ruled on questions certified by Judge Weber that the allegations of the complaint adequately allege a cause of action because a brucellosis-exposed bull can lawfully move interstate from a stockyard onto (1) a recognized slaughtering establishment; (2) a quarantined feedlot or (3) in some circumstances, directly back to the farm of origin. Since the complaint alleges that a brucellosis-exposed bull was moved from a stockyard in Texas to a livestock company in Louisiana, which is not one of the three permissible categories, the complaint adequately states a cause of action

Sherrie Kopka, for complainant.

Respondent, *pro se*

William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

RULING ON CERTIFIED QUESTIONS

This is an administrative proceeding for the assessment of a civil penalty for violating the regulations governing the interstate movement of cattle (9 CFR § 78.1 *et seq.*).

After respondent failed to file an answer, Judge Weber certified to the Judicial Officer the questions as to whether the allegations of the complaint state a cause of action under 9 CFR § 78.8 (1983), and whether there are sufficient factual allegations to establish a violation of 9 CFR § 78.8 (1983).

The complaint alleges:

II

On or about July 16, 1983, the respondent moved interstate one (1) brucellosis-exposed bull, from the Kirbyville Auction Barn in Kirbyville, Texas, to the Miller Livestock Company in DeRidder, Louisiana, other than in accordance with the regulations because the bull was moved interstate to a premises not authorized to receive such animal, in violation by Sections 78.5 and 78.8 of the regulations (9 CFR §§ 78.5 and 78.8).

Under 9 CFR § 78.5, .8 (1983), a brucellosis-exposed bull can be lawfully moved interstate from a stockyard only to (i) a recognized slaughtering establishment; (ii) a quarantined feedlot; or (iii) in some circumstances, directly back to the farm of origin. Since para-

graph 2 of the complaint alleges that the brucellosis-exposed bull involved here moved interstate from a stockyard in Texas to the "Miller Livestock Company in DeRidder, Louisiana," which is not one of the three categories permitted by the regulation, the complaint adequately states a cause of action, and there are sufficient factual allegations to establish a violation of the specified regulations.

In re: BOB BROWN. A.Q. Docket No. 108. Decided January 25, 1985.

Interstate transportation of cattle—Civil penalty—Consent.

Jaru Ruley, for complainant
William Cox, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Bob Brown, respondent, violated the Act and regulations promulgated thereunder (9 CFR §§ 71.18 and 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Bob Brown, respondent, is an individual doing business as B&C Cattle Company whose address is Rt. 2, Box 128, Ragley, Louisiana 70657.

2. On or about July 9, 1983, the respondent moved interstate, or caused the movement interstate of, 17 cattle from DeQuincey, Louisiana, to Grenada, Mississippi.

3. On or about January 10, 1984, the respondent moved interstate, or caused the movement interstate of, twenty-seven cattle from Raywood, Texas, to Grenada, Mississippi.

4. On or about January 16, 1984, the respondent moved interstate, or caused the movement interstate of, thirty-nine cattle from Hardin, Texas, to Grenada, Mississippi.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Bob Brown, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of fifteen hundred dollars (\$1,500.00). The respondent shall send a certified check or money order for \$1,500.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C., 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: M. L. PANTALION and JOE PANTALION. A.Q. Docket No. 108.
Decided January 25, 1985.

Interstate transportation of cattle—One respondent dismissed—Civil penalty—
Consent.

Jaru Ruley, for complainant
William Cov, for respondent

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that M. L. Pantalion and Joey Pantalion, respondents, violated the Act and regulations promulgated thereunder (9 CFR §§ 71.18 and 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents specifically admit that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

3. Pursuant to Section 1.137 of the Rules of Practice applicable to this proceeding (7 CFR § 1.137), complainant amends the above-referenced complaint to dismiss M. L. Pantalion from this matter.

FINDINGS OF FACT

1. Joey Pantalion, respondent, is an individual whose address is Rt. 1, Box 85, Hardin, Texas 77561.

2. On or about January 16, 1984, respondent moved interstate thirty-nine cattle from Hardin, Texas, to Grenada, Mississippi.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondents M. L. Pantalion and Joey Pantalion, such Order and Decision will be issued.

ORDER

The respondent, M. L. Pantalion, is dismissed from this matter. The respondent, Joey Pantalion, is assessed a civil penalty of five hundred dollars (\$500.00). The respondent shall send a certified check or money order for \$500.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C., 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondents.

n re: PIONEER BEEF COMPANY. A.Q. Docket No. 108. Decided January 25, 1985.

Interstate transportation of cattle—Civil penalty—Consent.

Jaru Ruley, for complainant
Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint led by the Administrator of the Animal and Plant Health Inspection Service alleging that Pioneer Beef Company, respondent, violated the Act and regulations promulgated thereunder (9 CFR § 71.18 and 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining

allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Pioneer Beef Company, herein referred to as the respondent, is a corporation incorporated under the laws of Mississippi and having its principal place of business at Second Street, P.O. Box 119, Grenada, Mississippi 38901.

2. On or about July 9, 1983, the respondent moved interstate, or caused the movement interstate of, 17 cattle from DeQuincey, Louisiana, to Grenada, Mississippi.

3. On or about January 10, 1984, the respondent moved interstate, or caused the movement interstate of, twenty-seven cattle from Raywood, Texas, to Grenada, Mississippi.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding with respect to respondent Pioneer Beef Company, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of fifteen hundred dollars (\$1,500.00). The respondent shall send a certified check or money order for \$1,500.00 payable to the "Treasurer of the United States," to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day upon which service of this Order is made upon the respondent.

In re: WRIGHTS NASSAU COUNTY FARMS, INC., W.P. WRIGHT, SR.,
and W.P. WRIGHT, JR. A.Q. Docket No. 131. Decided February
12, 1985.

Interstate transportation of cattle—Civil penalty—Consent.

Thomas Bundy, for complainant.

Dennis Blackburn, Jacksonville, Florida, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondents, violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondents admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents also stipulate and agree that the United States Department of Agriculture is the "prevailing party" in this proceeding and waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

FINDINGS OF FACT

1. W. P. Wright, Sr., and W. P. Wright, Jr., herein referred to as respondents, are individuals whose mailing address is Route 2, Box 270, Callahan, Florida 32011.

2. Wrights' Nassau County Farms, Inc., herein referred to as a respondent, is a corporation incorporated under the laws of the

State of Florida and having its principal place of business at Route 2, Box 270, Callahan, Florida 32011.

3. On or about March 12, 1984, respondents moved interstate approximately twelve (12) cows from Callahan, Florida to Alma, Georgia.

4. On or about March 13, 1984, respondents moved interstate approximately twenty-nine (29) cows from Callahan, Florida to Alma, Georgia.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

1. W. P. Wright, Sr., is assessed a civil penalty of three hundred dollars (\$300);

2. W. P. Wright, Jr., is assessed a civil penalty of three hundred dollars (\$300); and

3. Wrights' Nassau County Farms, Inc., is assessed a civil penalty of six hundred dollars (\$600). Such civil penalties shall be payable to the "Treasurer of the United States," by certified check or money order and which shall be forwarded to Thomas E. Bundy, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day this Order is served upon the respondents.

In re: PHILIP ANDREWS. A.Q. Docket No. 97. Decided January 2, 1985.

Interstate transportation of infectious horse—Civil penalty.

Respondent shipped interstate a known infectious horse without a certificate. Respondent was assessed a civil penalty of \$1,000.00.

Joseph Pembroke, for complainant.

Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111, 120, and 122) (Act) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated Sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and Section 74.5 of the regulations promulgated thereunder (9 CFR § 74.5).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on September 14, 1984, by certified mail.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and waiver of such hearing. More than twenty (20) days have elapsed since Respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to Sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

FINDINGS OF FACT

1. Phillip Andrews, is an individual whose mailing address is Route 14, Box 1211, Lake Charles, Louisiana.

2. During the month of March 1983, respondent shipped interstate a known equine infectious anemia reactor horse from Lake Charles, Louisiana to Victoria, Texas in violation of section 75.4(c)(3) of the regulations, because the horse was moved interstate without being accompanied by a certificate, as required.

CONCLUSIONS

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Respondent is hereby assessed a civil penalty of one thousand dollars (\$1000) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422-South Bldg., United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this Order.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final February 13, 1985.—Ed.]

In re: ALLAN THOMPSON. A.Q. Docket No. 101. Decided January 2, 1985.

Interstate transportation of brucellosis-exposed cow—Brucellosis—Civil penalty. Respondent shipped interstate a brucellosis-exposed cow. Respondent was assessed a civil penalty of \$300.00.

Joseph Pembroke, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111, 120 and 122) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent has violated Sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and Section 78.8(a)(2) of the regulations promulgated thereunder (9 CFR §§ 78.8(a)(2)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on September 24, 1984 by certified mail.

Pursuant to Section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and a waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has not filed an answer to date. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 CFR §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the Findings of Fact.

FINDINGS OF FACT

1. Allan Thompson whose address is Star Route, Willow Springs, Missouri 65793.
2. That on or about April 9, 1984, respondent shipped interstate one brucellosis-exposed cow from Central Ozarks Live Market, West Plains, Missouri, to Pioneer Packing Company, Grenada, Mississippi in violation of Section 78.8(a)(2) of the regulations (9 CFR § 78.8(a)(2), in that cow was not accompanied by a VS Form 1-27 or "S" brand permit, as required.

CONCLUSION

By reason of the facts in the Findings of Fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following Order is issued.

ORDER

Respondent is hereby assessed a civil penalty of three hundred dollars (\$300) which shall be payable to the "Treasurer of the United States", by certified check or money order, and shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this Order.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final February 14, 1985.—Ed.]

In re: STOKES and BROGDEN STOCKYARD, INC. A.Q. Docket No. 109.
Decided January 2, 1985.

Interstate transportation of cattle—Civil penalty.

Respondent shipped cattle interstate in violation of regulations. Respondent was assessed a civil penalty of \$300.00.

Kris Ihejiri, for complainant.

Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was instituted under the Act of February 2, 1903, as amended (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged respondent Stokes and Brogden Stockyard, Inc., violated sections 111 and 120 of the Act (21 U.S.C. § 111 and § 120) and Section 78.8 of the regulations promulgated thereunder (9 CFR § 78.8). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon the respondent.

Pursuant to section 1.136 of the Rules of Practice (7 CFR § 1.136) applicable to this proceeding, the respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer to, or plead specifically to, any allegation in the complaint would constitute an admission of such allegation pursuant to Section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). The respondent was also informed that the failure to file an answer would constitute a waiver of hearing, as provided in Section 1.139 of the Rules of Practice (7 CFR § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint,

pursuant to Section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under Section 1.139 of the Rules of Practice (7 CFR § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

FINDINGS OF FACT

1. Stokes and Brogden Stockyard, Inc., herein referred to as the respondent, is a corporation doing business in the State of Alabama and having its principal place of business at Andalusia, Alabama 36420.

2. On or about March 15, 1984, the respondent moved interstate from Meridian, Mississippi, to Plant City, Florida, approximately two (2) cattle in violations of Section 78.8 of the regulations because the cattle were not accompanied by a VS Form 1-27 permit or "S" Brand permit, as required.

CONCLUSION

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By its silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

By reason of the Findings of Fact set forth above, the respondent has violated the Act and regulations promulgated thereunder. The following Order is therefore, issued.

ORDER

Respondent Stokes and Brogden Stockyard, Inc., is hereby assessed a civil penalty of three hundred dollars (\$300.00) which shall be payable to the "Treasurer of the United States," by certified check or money order and which shall be forwarded to Kris H. Ikejiri, Esq., Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this order.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final February 14, 1985.—Ed.]

In re: PATRICIA LEE STOTLER a.k.a PATRICIA PELTIER. A.Q. Docket No. 120. Decided February 14, 1985.

Mark Dopp, for complainant.
Respondent, pro se

Decision by John A. Campbell, Administrative Law Judge.

ORDER GRANTING MOTION TO DISMISS

For good cause shown, complainant's Motion to Dismiss the complaint in this proceeding is *granted*.

In re: CORDIS O. SCOTT. A.Q. Docket No. 61. Decided February 15, 1985.

Interstate transportation of cattle—Civil penalty—Consent.

Kris Ihejiri and Fronda Woods, for complainant
Respondent, pro se.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was initiated by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, alleging that the respondent, Cordis O. Scott, violated various regulations issued pursuant to the Act of February 2, 1903, as amended (Act)(21 U.S.C. § 111 and § 120). The parties have agreed that this proceeding should be terminated by the entry of a consent decision and order.

For purposes of this proceeding only, the respondent specifically admits that the Secretary of Agriculture has jurisdiction in this matter; neither admits nor denies the remaining allegations in the complaint, and further stipulates that he will not challenge or otherwise contest the Findings of Fact and Order issued below. Respondent admits to the Findings of Fact set forth below, and waives:

A) any further procedure;

B) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or basis thereof;

C) all rights to seek judicial review and otherwise challenge or contest the validity of the decision.

Respondent also stipulates and agrees that the U.S. Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the U.S. Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. Section 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Cordis O. Scott, respondent, is an individual whose address is 2620 Cloverdale Road, Florence, Alabama 35630.

2. On or about June 1, 1983, the respondent moved interstate from Florence or Russellville, Alabama, to Tupelo, Mississippi, four (4) cattle.

3. On or about September 15, 1983, the respondent moved interstate from Savannah, Tennessee, to Cullman, Alabama, two (2) cattle.

4. On or about October 12, 1983, the respondent moved interstate, from Savannah, Tennessee, to Cullman, Alabama, one (1) cow.

CONCLUSIONS

Respondent, having admitted the jurisdictional facts, and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent is assessed a civil penalty of five thousand dollars (\$5,000), which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris Ikejiri, U. S. Dept. of Agriculture, Office of the General Counsel, Room 2422-South Building, Washington, DC 20250-400, by May 1, 1985.

This Order shall become effective upon signature of the parties and of the Administrative Law Judge.

In re: WALTER RAY THOMAS A.Q. Docket No. 110. Decided January 7, 1985.

Interstate transportation of cattle—Brucellosis—Civil penalty.
Respondent shipped cattle interstate in violation of regulations. Respondent was assessed civil penalties of \$1,000.00.

Jaru Ruley, for complainant
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 CFR §§ 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 CFR §§ 70.1 *et seq.* and 7 CFR §§ 1.130 *et seq.*

This proceeding was instituted by a complaint filed on October 16, 1984, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about November 22, 1983, respondent transported at least two cows interstate from Ozark, Missouri, to Sulphur Spring, Texas, in violation of Section 78.9(c)(3)(ii) of the regulations (9 CFR § 78.9(c)(3)(ii)) in that at least two cows were not accompanied interstate by a certificate or by a "Permit for Entry." In his answer, respondent admitted the material allegations contained into the complaint, thereby waiving a hearing. (See 7 CFR § 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this Decision is issued pursuant to Section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent, Walter Ray Thomas, is an individual whose address is 612 Freeman Street, Sulphur Springs, Texas 75482.

2. On or about November 22, 1983, the respondent moved interstate at least two cows from Ozark, Missouri, to Sulphur Springs, Texas. The movement was in violation of Section 78.9(c)(3)(ii) of the regulations (9 CFR § 78.9(c)(3)(ii)) because the cows, which did not go directly to slaughter or to a quarantined feedlot, were not accompanied interstate by a certificate showing perscribed information, as required.

3. On or about November 22, 1983, the respondent moved interstate at least two cows from Ozark, Missouri, to Sulphur Springs, Texas. The movement was in violation of Section 78.9(c)(3)(ii) of the regulations (9 CFR § 78.9(c)(3)(ii)) because the cows, which did not go directly to slaughter or to a quarantined feedlot, were not accompanied by a "Permit for Entry," as required.

CONCLUSION

By reason of the facts contained in the Findings of Fact above, the respondent has violated Section 78.9(c)(3)(ii) of the regulations (9 CFR § 78.9(c)(3)(ii)).

Therefore, the following Order is issued.

ORDER

Respondent, Walter Ray Thomas, is hereby assessed a civil penalty of one thousand dollars (\$500.00 per violation). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422 South Bldg., United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final February 19, 1985.—Ed.]

In re: RAY BURK d/b/a RAY BURK LIVESTOCK COMPANY. A.Q. Docket No. 23. Decided January 11, 1985.

Interstate transportation of brucellosis—exposed cattle—Civil penalty.

Respondent shipped brucellosis-exposed cattle interstate without a valid permit. Respondent was assessed a civil penalty of \$500.00.

Joseph Pembroke, for complainant

Wayne J Carroll, Louisville, Kentucky, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is an administrative proceeding for the assessment of a civil penalty against the respondent for violation of the Act of February 2, 1903, as amended (21 U.S.C. § 111 and § 120; hereafter called the "Act") and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*; hereafter called "regulations"). This proceeding was instituted by a complaint filed on January 12, 1984, by the Administrator of the Animal and Plant Health Inspection Service, United States De-

partment of Agriculture. Respondent filed an answer on January 25, 1984.

The complaint alleges that on or about February 13, 1983, respondent shipped interstate three (3) calves from Louisville, Kentucky, to Brown Packing Company, South Holland, Illinois, in violation of section 3 of the Act (21 USC 122) and sections 78.5 and 78.8(a)(2) of the regulations, because the calves, which were brucellosis exposed, were not accompanied by a valid permit.¹

An oral hearing was held in Louisville, Kentucky on September 12, 1984. Complainant was represented by Sally Lorang and Joseph Pembroke, Office of the General Counsel, U.S. Department of Agriculture, Washington, D. C. Respondent, Ray Burk, represented himself at the hearing. At the close of the hearing, the time was fixed for the filing of briefs. Wayne J. Carroll, Esq. of Louisville, Kentucky filed a brief on behalf of respondent.

FINDINGS OF FACT

1. Brucellosis is a contagious, infectious, and communicable disease primarily affecting cattle and swine. It is also a threat to the public health in that it affects humans. Because of the heavy losses incurred by the livestock industry by brucellosis, the United States Department of Agriculture, in cooperation with the various States, is engaged in a nationwide brucellosis eradication program. (Tr 12-13)

2. The brucellosis eradication program consists of two essential facets. The first part of the program is designed to find the infection through testing animals on the farm or by testing animals at concentration points and at slaughter, and tracing them back to the herd of origin. The second part restricts the interstate movement of certain animals to prevent the spread of brucellosis. Such control includes ascertaining the movements of known diseased and exposed animals as well as the interstate movement of cattle not known to be affected with the disease, to insure that the animals are properly moved to destinations known and approved by the responsible disease control officials located in the States of destination. Where such control is not maintained, brucellosis may be spread interstate by animals of unknown disease status which are carrying the disease, and thereby inflict losses upon livestock producers and hinder the brucellosis eradication program. (Tr 14-16)

¹ The calves, which were moved from Alabama to Tennessee to Kentucky to Illinois were originally purchased at the Northwest Alabama Livestock Auction, Russellville, Alabama and did not go directly to slaughter from Alabama as required.

3. Respondent, Ray Burk, is an individual who is doing business as Ray Burk Livestock Company, and whose mailing address is 1048 E. Main Street, Room 114A, Bourbon Stockyard, Louisville, Kentucky 40206.

4. As of October 25, 1982, the Holland Farm, where the three calves involved in this proceeding originated, was quarantined by the State of Alabama because the cattle located there were exposed to brucellosis.

5. On January 25, 1983, the F. V. Holland herd, from which the three calves (64 AUW8513, 64AYW8514, 64AUW8515) originated, was tested, and 14 of the 32 cattle tested were positive reactors for brucellosis.

6. On or about January 31, 1983, H. R. Thompkins, acting as order buyer for Harry Floyd, purchased the three calves and obtained a VS Form 1-27 permit to move the exposed "B" branded animals directly from the Northwest Alabama Livestock Auction, Russellville, Alabama, to slaughter at the Brown Packing Company, South Holland, Illinois. The permit contains the following statement:

**WARNING TO OWNER, SHIPPER AND TRUCKER
LIVESTOCK MUST BE DELIVERED TO CONSIGNEE
WITHOUT DIVERSION.**

7. The three calves were transported from Alabama through Tennessee to Respondent's Livestock Company in Louisville, Kentucky. Thereafter, on or about February 13, 1983, respondent shipped the calves to the Brown Packing Company in Illinois. Respondent did not look at the permit issued in Alabama which accompanied the calves nor did he attempt to obtain a new permit for shipment of the calves from Kentucky to Illinois.

PERTINENT STATUTORY PROVISIONS

(21 U.S.C.A.)

§ 111. *Regulations to prevent contagious diseases*

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia

in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

§ 120. *Regulation of exportation and transportation of infected livestock and live poultry*

In order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other livestock and/or live poultry, and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

§ 122. *Offenses; penalties*

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of Title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

PERTINENT REGULATIONS

(9 CFR Part 78)

§ 78.1 *Definitions*

(a) *Brucellosis*. The contagious, infectious, and communicable disease caused by bacteria of the genus *Brucella*. It is also known as Bangs disease, undulant fever, and contagious abortion.

(m) *Moved*. Shipped, transported, or otherwise moved, or delivered or received for movement.

* * * * *

(o) *Permit*—(1) *Permit (VS Form 1-27 or comparable state form)*. Except for the terms “permit for entry” and “S” brand permit, a permit shall mean an official document issued by a Veterinary Services representative, State representative, or accredited veterinarian which is required to accompany “B” branded cattle and bison (or exposed animals moved under official seal). It shall list one of the following: the official metal eartag . . . It shall also list the reactor tag number, owner’s name and address, *origin and destination locations*, number of animals covered, and the purpose of the movement. If a change in destination is desired or becomes necessary, a new permit must be obtained. (emphasis added)

(aa) *Brucellosis exposed animal*.

Except for brucellosis reactors, animals that are part of a known infected herd, or are in a quarantined feedlot or a quarantined pasture, or are brucellosis suspects, or that have been in contact with brucellosis reactors in marketing channels for a period of 24 hours or for a period of less than 24 hours if the reactor has aborted, calved or farrowed within the past 30 days or has a vaginal or uterine discharge, are considered to be exposed regardless of the blood tests results.

§ 78.5 *General restrictions*

Cattle may not be moved interstate in compliance with the regulations in this part.

§ 78.8 *Brucellosis-exposed cattle*

(a) Movement of brucellosis-exposed cattle for immediate slaughter . . . Other brucellosis-exposed cattle may be moved directly to a recognized slaughtering establishment, or from a farm of origin directly through no more than one specifically approved stockyard and then directly to a recognized slaughtering establishment, only if such cattle are:

(1) Individually identified by a Veterinary Service approved metal eartag or a USDA backtag;

(2) Accompanied by a VS Form 1-27 permit or “S” brand permit; and

(3) Such cattle are:

(i) “S” branded before the animals leave the premises from which they move interstate, or

(ii) In the instances when a claim for indemnity is being made by the owner under the provisions of 9 CFR 51.3, they are identified with the letter “B” as prescribed in 9 CFR 51.5, or . . .

CONCLUSIONS

All contentions of the parties raised at the hearing and in briefs have been considered in the light of the entire record in arriving at this decision.

Based upon the record evidence in this proceeding, it is concluded:

1. On or about February 13, 1983, respondent moved three brucellosis-exposed calves from the Bourbon Stockyards, Louisville, Kentucky, to Brown Packing Company, South Holland, Illinois, without a valid permit, in violation of 9 CFR § 78.5 and § 78.8; and

2. A civil penalty of five hundred dollars (\$500.00) is an appropriate sanction.

I

The evidence in the record of this proceeding establishes that the three calves came from a farm quarantined for brucellosis by the State of Alabama.

The calves involved in this case were identified by eartag numbers 64AUW8513, 64AUW8514, and 64AUW8515. These animals were traced to the Holland Farm through a Brucellosis Test Record, VS Form 4-34. The results of this January 25, 1983, test indicates that of the thirty-two animals tested, fourteen had positive reactions for brucellosis. In addition, the State of Alabama had previously placed the Holland Farm under a Special Quarantine on October 25, 1982, because many of the animals were brucellosis reactors.

At the hearing, Dr. Odenweller and Compliance Officer Robert Figulski testified that such a high incidence of brucellosis in this herd substantiates the calves' exposure to the disease and also increases the exposure potential to other animals.

The calves were bought as "B" branded brucellosis-exposed animals by Mr. Floyd's buyer, Mr. Thompkins. On January 31, 1983, Mr. Thompkins received a USDA permit to move these animals directly from the stockyard in Alabama where they were purchased to a slaughtering establishment in Illinois. However, Mr. Floyd made arrangements to divert the cattle through Tennessee to the Bourbon Stockyards in Kentucky.

For 10-11 days these brucellosis-exposed calves, after leaving the Northwest Alabama Livestock Auction, were unaccounted for until respondent received them on February 11, 1983. These animals were not moved directly to slaughter as required under the regulations. Respondent knew that these animals were restricted livestock, that they were "B" branded, that they were diverted, and that they were supposed to go directly to slaughter.

Mr. Burk admits that he received the calves but argues that since he was the last person to participate in the diversion he is therefore not culpable.

In his brief, respondent argues that he did not violate 9 CFR 78.5 and 78.8 because respondent did not divert the calves from their destination. Once he received the calves, he shipped them directly to the Brown Packing Company, South Holland, Illinois, the destination to which the cattle were to be moved according to the existing Alabama permit. Respondent argues further that he was not required by 9 CFR 78.1(o)(1) to obtain a new permit because he did not change the destination of the calves. He received the calves and shipped them to the destination (South Holland, Illinois) listed on the existing permit.

These arguments are not persuasive. 9 CFR 78.1(o)(1) requires that the permit contain both the origin and destination locations. The existing permit which accompanied the calves (Finding of Fact 6) listed the point of origin as Alabama and not Kentucky. That permit only authorized the movement of the calves directly from Alabama to Illinois.

Further, the calves were "moved" by Respondent. "Moved," as defined in 9 CFR 78.1(m) means: Shipped, transported, or otherwise moved, or delivered or received for movement.

Despite the knowledge that the calves were required to go directly to slaughter, respondent agreed to accept the calves and move them to the Brown Packing Company. Without respondent's cooperation, the diversion of the cattle could not have taken place. Even though these animals were diverted for ten to twelve days, respondent failed to request that another, proper permit be issued. The permit that respondent received to move the cattle was void on its face since it was valid only from Alabama to Illinois.

II

Complainant seeks the assessment of a \$500 civil penalty against respondent. This assessment appears appropriate in the light of the record evidence.

Title 21 of the United States Code, § 122 provides for assessment of a civil penalty "of not more than one thousand dollars" for the violation of regulations published pursuant to authority granted to the Secretary of Agriculture in section 111 and 120 of Title 21 of the United States Code.

Title 21 of the United States Code, §§ 111 and 120, authorizes the Secretary of Agriculture to issue regulations which govern the interstate transportation of animals from any place where communicable disease exists or where he may have reason to believe it

exists. The Secretary has issued such regulations governing the interstate transportation of cattle from herds known to be affected with brucellosis.

Title 9 of the Code of Federal Regulations, § 78.8(a), requires that brucellosis-exposed animals may move from a farm through no more than one specifically approved stockyard and then directly to a recognized slaughtering establishment only if such cattle are: (1) Individually identified by a Veterinary Service approved metal eartag or a USDA backtag; (2) Accompanied by a VS Form 1-27 permit or "S" brand permit and (3) such cattle are: (i) "S" branded before the animals leave the premises from which they moved interstate or (ii) if asking for indemnity under 9 CFR § 51.3, the cattle are identified with the letter "B".

The complaint filed in this case charges that respondent shipped three brucellosis-exposed calves interstate from Kentucky to Illinois without a valid permit. Testimony of Kentucky Compliance Officer Robert Figulski, of Field Veterinary Medical Officer and Designated Epidemiologist in the State of Kentucky, Roger Odenweller, and of the respondent, established that on or about February 13, 1983, respondent moved, within the definition of 9 CFR 78.1(m), three brucellosis-exposed calves from Louisville, Kentucky, to Brown Packing Company, South Holland, Illinois.

This diversion undermines the effort of the Department to properly trace the movement of the exposed animals to slaughter and prevent the spread and exposure to non-contaminated animals. Such action, or inaction, impedes the efforts of the Department to eliminate or prevent the further spread of the disease in the United States. The investigation revealed that these animals moved at least twice and maybe as many as three times before finally going to slaughter approximately 14 days after the permit was issued in Alabama. It is through non-compliance such as in this instance that brucellosis may be spread and cause economic losses to individual livestock owners and to the nation.

As Dr. Odenweller testified at pages 55 and 56 of the hearing record:

"In fact, unfortunately this is how a lot of brucellosis is spread; by what we consider negative animals on serological tests but exposed to brucellosis. Even though we tested them at the yard, at that point in time, they are not demonstrating antibodies and, therefore, the test, serological tests, that we use to determine if an animal is infected or negative—but truly they have been exposed and are developing the disease. They just are not demonstrating (titer)

at that point in time. There is a lag in time from the point of exposure to infection, to demonstration of (titer), and usually, this is 14 to 30 days. It can be as long as a year or longer possibly. So it's—this is why we need, if I can emphasize, we need control of these animals that we know—known status. In other words, these animals came from an infected herd. These animals had a high probability of exposure and infection. We need to control these movements. I know that in most instances they try to do a good job, but if those animals would have slipped through the loops, and they would be sitting on somebody's farm now, and subsequently that herd that this man has spent a lot of time developing could end up being infected and disseminated through that and the loss of the herd."

Brucellosis, a bacterial disease, can cause, among other things, abortion, a drop in milk production, and a loss of weight in some cattle. (Tr. 12, 57) A result of this would be to greatly increase costs to the cattle industry in the United States and, consequently, an increase in the price of cattle products to consumers. Dr. Odenweller stated that the loss of weight or milk production could cost the individual farmer between 800-900 dollars per animal a year. (Tr. 57) Furthermore, brucellosis can present itself as a public health threat to humans in the form of undulant fever.

Compliance with regulations contained in Part 78 of Title 9 of the Code of Federal Regulations is in the best interest of everyone in the livestock industry. Because of the highly infectious nature of brucellosis, it would only take one act of noncompliance, where a diseased animal is transported interstate and mingled with numbers of unaffected cattle to cause a far-reaching disease problem to develop. In sum, the sanction should be adequate to deter the respondent and others from future violations, thus assuring future compliance.

The evidence established at the hearing in this matter reflects that the requested \$500 civil penalty is appropriate and reasonable to accomplish the goals of compliance and deterrence of respondent and others similarly situated and is so ordered.

ORDER

1. Respondent, Ray Burk, is assessed a civil penalty of \$500.00 dollars. This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Joseph Pembroke, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture,

Washington, D. C. 20250, within thirty (30) days after the date of the effective date of this Order.

2. This Order shall be final and effective 35 days after the date of service of this Order unless there is an appeal to the Judicial Officer within 30 days of service pursuant to Section 1.145 of the applicable Rules of Practice. (7 CFR § 1.145)

3. Copies hereof shall be served on the parties.

[This Decision and Order became final February 23, 1985.—Ed.]

In re: JOHN B. STACKS. A.Q. Docket No. 42. Decided February 25, 1985.

*Kevin Thiemann and William Jenson, for complainant.
Respondent, pro se.*

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING THE COMPLAINT

Complainant has filed a Motion to Dismiss the complaint because formal adjudication is no longer considered necessary.

IT SHOULD BE AND HEREBY IS ORDERED that the complaint is dismissed without prejudice.

In re: BOB BROWN. A.Q. Docket No. 108. Decided February 26, 1985.

*Jaru Ruley, for complainant.
Respondent, pro se.*

Decision by Dorothea Baker, Administrative Law Judge.

DECISION AMENDED

In view of the premises set forth in complainant's Motion to Amend Consent Decision, the original Consent Decision is so amended.

In re: PLUMA GILLILAND. A.Q. Docket No. 132. Decided February 26, 1985.

Interstate transportation of cattle—Civil penalty—Consent.

Kris Ikejiri, for complainant

Respondent, *pro se*.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111 and § 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Pluma Gilliland violated the Act and regulations promulgated thereunder (9 CFR § 71.1 and § 78.1 *et seq.*). Respondent Pluma Gilliland and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent Pluma Gilliland admits specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Pluma Gilliland also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Pluma Gilliland, herein referred to as the respondent, is an individual whose address is Route 2, Box 397, Lincoln, Alabama 35096.

2. On or about August 13, 1983, the respondent moved interstate from Lincoln, Alabama, to LaFayette, Georgia, approximately nine (9) cattle.

CONCLUSIONS

Respondent Pluma Gilliland having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Pluma Gilliland is assessed a civil penalty of eight hundred dollars (\$800.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Officer of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington D.C., 20250, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day of this Order is served upon the respondent.

In re: TERRY'S FARM SERVICE, INC. and TOMMY JOE TOWNSEND. A.Q.
Docket No. 135. Decided February 26, 1985.

Interstate transportation of poultry accessories—Civil penalty—Consent.

Kris Ikejiri, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111 and § 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Terry's Farm Service, Inc., and Tommy Joe Townsend violated the Act and regulations promulgated thereunder (9 CFR § 71.1 and § 78.1 *et seq.*). Terry's Farm Service, Inc., Tommy Joe Townsend, and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondents Terry's Farm Service, Inc. and Tommy Joe Townsend admit specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admit nor deny the remaining allegations in the

complaint, admit to the Findings of Fact set forth below, and waive:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondents Terry's Farm Service, Inc. and Tommy Joe Townsend also stipulate and agree that United States Department of Agriculture is the "prevailing party" in this proceeding and waive any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondents in connection with this proceeding.

FINDINGS OF FACT

1. Terry's Farm Service, Inc., herein referred to as the respondent, is a corporation doing business in North Carolina and whose mailing address is 801 Dudley Shoals Road, Granite Falls, North Carolina 28630.

2. Tommy Joe Townsend, herein referred to as respondent, is an individual whose mailing address is Route 1, Box 470, Granite Falls, North Carolina 28630.

3. On or about August 22, 1984, the respondents moved interstate from Palmyra, Pennsylvania to Woodstock, Virginia, approximately 8,400 poultry coops, containers and other accessories.

CONCLUSION

Respondents Terry's Farm Service, Inc. and Tommy Joe Townsend having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondents Terry's Farm Service, Inc., and Tommy Joe Townsend are assessed a civil penalty of five hundred dollars each (\$1,000.00 total) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington D.C., 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day of this order is served upon the respondents.

In re: A.W. CHERRY AND SONS, A.Q. Docket No. 77. Decided February 28, 1985.

Interstate transportation of cattle—Civil penalty— Consent.

Thomas Bundy, for complainant.

Respondent, pro se

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (9 CFR § 78.1 *et seq.*). Respondent and complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure:

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or basis thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. A.W. Cherry and Sons, Livestock Dealers, herein referred to as the respondent, is a partnership whose address is Route 5, Lebanon, Tennessee 37087.

2. On or about May 17, 1983, respondent moved interstate two (2) cows from Greensburg, Kentucky to Lebanon, Tennessee.

3. On or about May 19, 1983, respondent moved interstate two (2) cows from Saluda, South Carolina to Lebanon, Tennessee.

4. On or about May 19, 1983, respondent moved interstate ten (10) cows from Cumming, Georgia to Lebanon, Tennessee.

5. On or about May 21, 1983, respondent moved interstate one (1) cow from Crossville, Alabama to Lebanon, Tennessee.

6. On or about May 22, 1983, respondent moved interstate seven (7) cows from Lebanon, Tennessee to Ohiowa, Nebraska.

7. On or about June 4, 1983, respondent moved interstate two (2) calves from Glasgow, Kentucky, to Lebanon, Tennessee.

8. On or about September 29, 1983, respondent moved interstate nine (9) cows from Lebanon, Tennessee, to Palestine, Texas.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of six thousand five hundred dollars (\$6,500.00) which shall be payable to the "Treasurer of the United States," by certified check or money order and which shall be forwarded to Thomas E. Bundy, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day this Order is served upon the respondent.

In re: LLOYD SANNESS d/b/a PORK CENTRAL FEEDER PIGS and WILLIAM BESLER. A.Q. Docket No. 122. Decided February 28, 1985.

Interstate transportation of pigs—Civil penalty—Consent.

Mark Dopp, for complainant
Respondent *Besler*, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION BY WILLIAM BESLER

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that respondent violated the Act and regulations promulgated thereunder (9 CFR § 76.1 and § 85.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. William Besler, respondent, is an individual whose address is Route 2, Hopkinton, Iowa 52237.

2. William Besler is a licensed Pig Dealer's Agent (Iowa License No. 520) for Lloyd Sanness, owner and operator of Pork Central Feeder Pigs, Spring Grove, Minnesota.

3. On or about February 3, 1984, the respondent William Besler moved interstate from Spring Grove, Minnesota, to Charles City, Iowa, 105 feeder pigs.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent William Besler is assessed a civil penalty of one hundred dollars (\$100). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422-South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the effective date of this Order.

This Order shall become effective on the day this Order is served upon the respondent.

n re: LLOYD SANNESS d/b/a PORK CENTRAL FEEDER PIGS and WILLIAM BESLER. A.Q. Docket No. 122. Decided February 28, 1985.

Interstate transportation of pigs—Civil penalty—Consent.

Mark Dopp, for complainant.

Dennis Redwing, La Crescent, Minnesota, for respondent Sanness.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION BY LLOYD SANNESS

This proceeding was instituted under the Act of February 2, 1903, as amended, (Act) (21 U.S.C. §§ 111 and 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that the respondent violated the Act and regulations promulgated thereunder (9 CFR §§ 76.1 and 85.1 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, the respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining

allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

- (a) Any further procedures;
- (b) Any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issue of fact, law, or discretion, as well as the reasons or bases thereof;
- (c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Lloyd Sanness, respondent is an individual whose address is 305 West Main Street, Spring Grove, Minnesota 55974.

2. On or about February 3, 1984, the respondent moved interstate from Spring Grove, Minnesota to Charles City, Iowa, 105 feeder pigs.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent Lloyd Sanness is assessed a civil penalty of seven hundred dollars (\$700). The respondent shall send, payable to the "Treasury of the United States" a certified check or money order, to Mark D. Dopp, Office of the General Counsel, Room 2422 South Building, United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the effective date of this order.

This Order shall become effective on the day this Order is served upon the respondent.

In re: L. DOSTIE EGG FARM. ERCIA Docket No. 6. Decided December 27, 1984.

Failure to mail handler reports on timely basis—Failure to remit assessment obligations—Civil penalties.

Respondent failed to mail handler reports on timely basis to the AEB. Respondent also failed to remit assessment obligations to the AEB. Respondent was ordered to cease and desist from such violations and was assessed civil penalties totaling \$28,000.00.

Gregory Cooper, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

This is a proceeding under the Egg Research and Consumer Information Act, as amended (7 U.S.C. 2701 *et seq.*, hereinafter referred to as the Act), the Egg Research and Promotion Order (7 CFR 1250.301–.363, hereinafter referred to as the Order) and the Rules and Regulations thereunder (7 CFR 1250.500–.552, hereinafter referred to as the Regulations). The Acting Administrator, Agricultural Marketing Service, pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 CFR Part 1, Subpart H) and Section 15(b) of the Act (7 U.S.C. 2714(b)), initiated this proceeding with a complaint filed on August 14, 1984. Copies of the complaint and the applicable Rules of Practice were duly served by certified mail on respondent on August 17, 1984, by the Hearing Clerk in accord with said Rules of Practice (7 CFR 1.147(b)). No answer was filed by the respondent and the respondent was so notified in a letter by the Hearing Clerk sent on September 18, 1984. No answer or other communication has been received from the respondent.

Respondent's failure to file an answer within the time specified in the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing (7 CFR 1.136(c), 1.139). Therefore, this Decision and Order is entered according to the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1.(a) L. Dostie Egg Farm, hereinafter referred to as the respondent, is a partnership, and a person within the provisions of the Act (7 U.S.C. 2702(b)), which has its principal place of business at West River Road, Box 94, Augusta, Maine 04330.

(b) Respondent is, and at all times material herein was, engaged in business as an egg producer/handler handling eggs of its

own production and was subject to the Act, the Order, and the Regulations.

(c) Respondent is, and at all times material herein was, a collecting handler as defined in the Order (7 CFR 1250.348) and the Regulations (7 CFR 1250.516), required to submit handler reports and remit assessments to the American Egg Board for eggs of its own production on a calendar month reporting period basis.

(d) The American Egg Board (AEB) is the agency duly appointed by the Secretary of Agriculture to administer the Order.

2.(a) During each reporting period since March 1, 1982, respondent violated and continues to violate the Act, the Order, and the Regulations by failing to mail handler reports to the AEB, as required by section 1250.351 of the Order and section 1250.529 of the Regulations, on a timely basis on or before the 15th day after the end of each such reporting period.

(b) During each reporting period since March 1, 1982, respondent violated and continues to violate the Act, the Order, and the Regulations by failing to remit to the AEB assessment obligations due on eggs of its own production, as required by sections 1250.347 and .348 of the Order and sections 1250.514, .516 and .517 of the Regulations, on a timely basis on or before the 15th day after the end of each such reporting period. The amount so owed totalled \$777.80 as of November 16, 1983, based on an AEB audit up to, and including, the October 1983 reporting period. The amount now owed includes this amount plus as yet unreported and unaudited amounts for assessments for each reporting period after October 1983.

CONCLUSIONS

By reason of the Findings of Fact set forth herein, respondent has violated Section 15(b)(1) of the Act (7 U.S.C. 2714(b)(1)), Sections 1250.347, .348 and .351 of the Order (7 CFR 1250.347, .348 and .351), and Sections 1250.514, .516, .517 and .529 of the Regulations (7 CFR 1250.514, .516, .517 and .529). These violations warrant the sanctions authorized under the Act (7 U.S.C. 2714(b)(1)) and contained in the following Order.

ORDER

Respondent, its partners, officers, agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from violating the provisions of the Act, the Order, and the Regulations by failing to file handler reports and remit assessment obligations to the AEB each reporting period on a timely basis, and by failing to promptly submit to the AEB all overdue

handler reports and remit to the AEB all overdue assessment obligations, totalling \$777.80 for the 20 reporting periods beginning on March 1, 1982, and ending on October 31, 1983, and an as yet unreported and unaudited amount for the reporting periods thereafter.

Respondent is assessed civil penalties in the amount of \$500 for each of the violations involving the failure to file reports with the AEB on a timely basis and \$500 for each of the violations involving the failure to remit assessment obligations to the AEB on a timely basis, for a total of \$28,000 in civil penalties for the reporting periods prior to the filing of the complaint in this proceeding. Said civil penalties shall be paid by certified check or money order made to the order of the Treasurer of the United States and shall be forwarded to Gregory Cooper, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250, within 30 days from the date this Order becomes effective.

Copies of this Decision and Order shall be served upon the parties. This Decision and Order shall become final and effective 35 days after service upon the respondent unless an appeal is filed pursuant to Section 1.145 of the applicable Rules of Practice (7 CFR 1.145).

[This Decision and Order became final February 2, 1985.—Ed.]

In re: SUMMIT BEEF COMPANY. FMIA Docket No. 81. Decided December 19, 1984.

Denial of reinstatement of inspection service.

Respondent applied for reinstatement of federal meat inspection service. Due to prior felony convictions, respondent was denied inspection service for an indefinite time.

Harold Rueben and Kevin Thiemann, for complaint
Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a proceeding under the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), hereinafter referred to as the Act. The proceeding was instituted by a complaint filed by the Administrator of the Food Safety and Inspection Service, United States Department of Agriculture. The complaint alleges that the respondent, Summit Beef Company, is unfit to engage in any business requiring inspection under Title I of the Act within the meaning of Section 401 of the Act (21 U.S.C. § 671).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail on October 13, 1984.

Respondent was informed in the complaint and the letter of service that an answer should be filed within twenty (20) days, and that failure to file an answer either admitting, denying or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegation and a waiver of such hearing. Respondent has not filed an answer.

This Decision and Order, therefore, is issued pursuant to Sections 1.136 and 1.139 of the Rules of Practice (7 CFR §§ 1.136 and 1.139).

FINDINGS OF FACT

1.(a) Respondent, Summit Beef Company, is a firm seeking to resume operations of a meat processing establishment located at 1378 Market Street, Linwood, Pennsylvania 19061.

(b) Respondent is an applicant for reinstatement of federal meat inspection services under Title I of the Act, at the above named establishment.

(c) Vincent L. Perry is now, and at all times material herein was, listed as the owner of, and responsibly connected with, the respondent's operation.

2. On or about February 17, 1983, Vincent L. Perry, owner of respondent, was convicted in the United States District Court for the Eastern District of Pennsylvania, of one (1) felony for conspiring to transmit wager information, in violation of 18 U.S.C. § 371.

3. On or about April 27, 1984, Vincent L. Perry, owner of respondent, was convicted in the United States District Court for the Eastern District of Pennsylvania, of two (2) felonies for unlawfully distributing approximately one quarter pound of methamphetamine, a Schedule II non-narcotic drug controlled substance, on or about February 15, 1983, in violation of 21 U.S.C. § 841(a)(1), and on or about February 24, 1983, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2(a).

CONCLUSIONS

By reason of the facts alleged in paragraphs I and II herein, respondent is unfit to engage in any business requiring inspection under Title I of the Act, within the meaning of Section 401 of the Act (21 U.S.C. § 671).

ORDER

The inspection service under Title I of the Federal Meat Inspection Act (21 U.S.C. § 601 *et. seq.*) is hereby denied to, and withheld from, respondent Summit Beef Company, its officers, directors, successors and assigns, directly or through any corporate or other device, for an indefinite period of time.

Copies of this Decision and Order shall be served upon the respondent, and this Order shall become final and effective thirty ve (35) days after service hereof upon the respondent unless there is an appeal to the judicial officer as provided in Sections 1.139 and .145 of the Rules of Practice (7 CFR §§ 1.139 and 1.145).

[This Decision and Order became final January 29, 1985—Ed.]

In re: WARSAW MEAT COMPANY. FMIA Docket No. 82. Decided February 20, 1985.

Intimidation of FMIA inspector—Suspension of inspection service, held in abeyance with conditions—Consent.

Mark Dopp, for complainant.
Respondent, *pro se*

Decision by Dorothea A. Baker, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. § 601 *et seq.*), and the applicable Rules of Practice (9 CFR § 335.1 *et seq.*), to suspend federal meat inspection services from Warsaw Meat Company (respondent). This proceeding was commenced by a complaint issued on November 9, 1984, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of the federal meat inspection service. The parties have agreed that this proceeding should be terminated by the entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For purposes of this stipulation and the provisions of this consent decision only, respondent admits all of the jurisdictional allegations of the complaint and waives:

- (a) Any further procedural steps;
- (b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact or law, as well as the reasons or bases thereof; and
- (c) All right to seek judicial review or otherwise to challenge or contest the validity of this decision.

2. This stipulation and consent decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.

3. The respondent stipulates that the USDA is the "prevailing party" in this proceeding and waives any action against the USDA under the Equal Access to Justice Act of 1980, Pub.L. 96-481, for fees and other expenses incurred in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is a corporation which operates a slaughtering and meat processing establishment in Warsaw, North Carolina.

2. Respondent is now, and at all times material herein was, the recipient of inspection services under the FMIA (21 U.S.C. § 601 *et seq.*) at said meat processing establishment.

3. On or about September 28, 1984, an inspector who was performing official duties under the FMIA, reported to officials of the FSIS that he had been intimidated by Charles M. Contris, manager and secretary-treasurer of respondent.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Decision will be issued.

ORDER

I

The inspection service under the FMIA (21 U.S.C. § 601 *et seq.*) is hereby suspended indefinitely from, and shall not be provided to, respondent Warsaw Meat Company, its owners, affiliates, successors and assigns, directly or through any corporate or other device, commencing with the issuance of this Consent Decision. However, the suspension of inspection service will be held in abeyance and will not become effective:

(A) For so long as respondent or any of its owners, officers, partners, employees, agents or any establishment directly or indirectly, owned, operated, controlled, or supervised in any manner by Charles M. Contris do not violate (as that term is defined in paragraph II, *infra*) any section of the FMIA, or the regulations promulgated thereunder, or state or local statute involving the assault or threat to assault, intimidation, or interference with any program employee in the performance of his or her official duties under the FMIA; and

(B) For so long as respondent or any of its owners, officers, partners, employees, agents, or any establishment directly or indirectly, owned, operated, controlled, or supervised in any manner by Charler M. Contris do not violate (as that term is defined in paragraph II, *infra*) any section of the FMIA, or the regulations promulgated thereunder, or state or local statute involving the preparation, sale, transportation or attempted distribution of any adulterated or misbranded product.

II

The violation of any provision in paragraph I of this order will result in the immediate withdrawal of inspection services under Title I of the FMIA. The term "violate" means a violation found upon a final decision in a formal adjudicatory proceeding before

the Secretary of Agriculture or a conviction in federal or state court. This shall not preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

III

If any provision of this Order is declared to be invalid, such declaration shall not affect the validity of any other provision herein.

IV

This Order will become effective when issued.

In re: TRUMAN VOLKART. HPA Docket No. 169,172,176,177. Decided January 2, 1985.

Civil penalty—Consent

Robert Ertman, for complainant.

Roger G. Brown, Jefferson City, Missouri, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION AND ORDER

This is an administrative proceeding under the Horse Protection Act as amended (15 U.S.C. 1821 *et seq.*), instituted by complaints filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that respondent has violated the Horse Protection Act, as amended. This consent decision is entered under authority of the applicable Rules of Practice (7 CFR 1.138).

Respondent admits the jurisdictional allegations of the complaints, specifically admits the jurisdiction of the Secretary of Agriculture, neither admits nor denies the remaining allegations of the complaints, and waives oral hearing and further procedure. Respondent and complainant consent to the issuance of the following order:

ORDER

Respondent is assessed a civil penalty of \$3,000.00, which shall be paid by certified check or money order payable to the order of the Treasurer of the United States and forwarded to Robert A. Ertman, Office of the General Counsel, Room 2014—South Building, United States Department of Agriculture, Washington, D. C. 20250, within thirty (30) days from the date this order becomes effective. Further, respondent is disqualified from showing or exhibiting any horse, and from judging or managing any horse show, exhibition, or auction, for a period of one year beginning October 1, 1984. This Order shall be effective upon service on respondent.

In re: E. DIGBY PALMER. HPA Docket No. 132. Decided February 22, 1985.

Exhibitor—Disqualification—Civil penalty.

The Judicial Officer affirmed Judge Palmer's order assessing a \$2,000 civil penalty and disqualifying respondent from showing or exhibiting any horse for one year. The doctrine of laches is not applicable. An argument made for the first time on appeal comes too late to be considered. I infer that USDA officials properly present-

ed their credentials. The requirement that the examination of a horse be conducted within reasonable limits and in a reasonable manner is not unconstitutionally vague, although an administrative agency has no power to question the constitutionality of a statute under its jurisdiction. Intention to sore a horse is not required. Lack of knowledge that a horse was sore is not a mitigating circumstance.

Robert Ertmann, for complainant

Respondent, *pro se*.

Victor W. Palmer, Administrative Law Judge

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. § 1821 *et seq.*).

After a hearing, Administrative Law Judge Victor W. Palmer (ALJ) filed an initial decision and order on June 6, 1984, in which he found that the horse "Revelation of Pride" was sore when it was exhibited at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, on September 1, 1978. He assessed a civil penalty of \$2,000 against respondent and disqualified him from showing or exhibiting any horse and from judging or managing any horse show, exhibition or auction for a period of one year.

On February 20, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CRF § 2.35).¹

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as many similar cases have been decided in recent years, and oral argument would appear to serve no useful purpose.

Upon a careful consideration of the entire record in this case, the initial Decision and Order is adopted as the final Decision and Order, with a few trivial changes, followed by additional conclusions by the Judicial Officer.

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ADMINISTRATIVE LAW JUDGE'S DECISION

PRELIMINARY STATEMENT

This is an administrative proceeding pursuant to the Horse Protection Act, as amended, 15 U.S.C. §§ 1821-1831, in which respondent, E. Digby Palmer, a horse trainer and co-owner of the horse known as "Revelation of Pride" is charged with having entered, exhibited and shown the horse while it was "sore" in a horse show held on September 1, 1978. The complaint also charges that the chains fastened about the horse's forelimbs at the time it was exhibited and shown exceeded the weight permitted by regulation (9 CFR § 11.2(c)(2)).

Respondent, E. Digby Palmer, was initially represented by counsel who filed an answer on his behalf which admitted that respondent was a co-owner and trainer of "Revelation of Pride" and that he entered the horse on September 1, 1978, at the 40th Annual Tennessee Walking Horse National Celebration for the purpose of being shown and exhibited. The answer denied that the horse was then "sore" as that term is defined in the Act. The answer admitted that the horse was exhibited and shown in chains which exceeded the weight allowed by regulation but averred that this was not intentional. Counsel for respondent later struck his appearance, and when oral hearing was held in Shelbyville, Tennessee, on March 27, 1984, Mr. Palmer elected to proceed without counsel.

At the hearing, and by a post hearing brief, Mr. Palmer has challenged the opinion by the veterinarian who testified the horse was sore at the time it was entered, exhibited and shown. He admitted the chains used exceeded the weight allowed by regulation.

The record evidence clearly establishes that this horse was "sore" when exhibited and shown and an order is being entered against respondent assessing civil penalties of \$2,000.00 and disqualifying him for one year from showing or exhibiting any horse, and from judging or managing any horse show, exhibition, or auction under the provisions of the Act.

FINDINGS OF FACT

1. At all times material herein, respondent, E. Digby Palmer, was the trainer and co-owner of the horse "Revelation of Pride."
2. Respondent's mailing address is Route 3, Box 291, Shelbyville, Tennessee 37160.
3. On September 1, 1987, at the Tennessee Walking Horse National Celebration, respondent entered, exhibited and showed "Revelation of Pride" as Entry No. 1629 in Class No. 65.

4. On September 1, 1978, "Revelation of Pride" was examined by United States Department of Agriculture veterinarians as it entered the show ring and while it was being shown. They observed the horse to exhibit the characteristics of a "sore" horse. (Cx. 1 and Cx. 2).

5. When physically examined by United States Department of Agriculture veterinarians on September 1, 1978, following the event, "Revelation of Pride" exhibited abnormal sensitivity in both of its forelimbs. Dr. L. S. Crichfield testified, and it is found, that the horse could barely walk and was moving with great pain and difficulty and had excessive scar tissue on both front pasterns, and exhibited pain upon light to moderate palpation of both the anterior and posterior portions of both front pasterns.

6. When examined by a United States Department of Agriculture veterinarian trained in the use of thermovision, "Revelation of Pride" exhibited abnormal inflammation in both of its forelimbs (Cx. 5 and Cx. 6).

7. Respondent had "Revelation of Pride" in his care and training for a year before September 1, 1978, and at that time he was a four-year old. (Tr. 102).

8. Photographs (Cx. 10-18) taken at the time of the horse's physical examination corroborate Dr. Crichfield's testimony that the horse's forelimbs were excessively scarred for a four-year old and that it was crudely and abusively shod in violation of basic rules of hoof husbandry. Its front hooves were cracked and deformed as a result of being afflicted with founder; yet it was forced to perform as a Tennessee Walking Horse with 4½-inch high "pads" and heavy angle irons attached to its hooves. Respondent admitted he had no formal training as a farrier but he shod the horse himself, aided only by a local garage operator who welded the angle irons to the horseshoes as instructed by respondent.

9. One of the angle irons broke loose during the horse show causing the horse to stumble. Its stumbling resulted in lacerations which gave rise to charges that a cruel and inhumane bit was used. However, those charges have been dropped and are inconsistent with the evidence of record.

10. Respondent has explained he borrowed the excessively heavy chains from a friend who had been asked to furnish legal, 10-ounce chains.

CONCLUSIONS

1. The Secretary of Agriculture, United States Department of Agriculture, has jurisdiction over this action.

2. This proceeding is not barred by laches, and, the delay to this case being heard did not prejudice respondent in presenting his defenses.

3. On September 1, 1978, E. Digby Palmer, trainer and co-owner of the horse "Revelation of Pride" entered, exhibited and showed the horse at the Tennessee Walking Horse National Celebration while it was sore in violation of 15 U.S.C. § 1824(2)(A) and (B).

4. On September 1, 1978, E. Digby Palmer, trainer and co-owner of the horse "Revelation of Pride," exhibited and showed the horse while it was wearing excessively heavy chains in violation of a controlling regulation (9 CFR § 11.2(c)(2)).

The veterinarian who gave testimony in this case found abnormal sensitivity and inflammation in both of the horse's forelimbs when he examined it just after it had been exhibited and shown. The horse was, therefore, in every sense, a "sore" horse. The Act provides, in pertinent part:

"a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs . . ." (15 U.S.C. § 1825(d)(5)).

Respondent Palmer thereby violated the Act which prohibits:

"The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purposes of showing or exhibiting in any horse show or horse exhibition any horse which is sore, . . ." (15 U.S.C. § 1824(2)).

Although this case was delayed in going to hearing, the doctrine of laches has no application. Furthermore, none of the delay prejudiced respondent who has decided to defend himself by accusing the veterinarians who examined his horse of making false statements. However, the photographs and thermograms corroborate their affidavits and the testimony by Dr. Crichfield.

The only remaining issue is the appropriate sanction to be imposed. Under the Act, respondent is subject to a maximum penalty of \$2,000.00 and disqualification from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for this, his first, violation (15 U.S.C. § 1825(C)(b)(1) and (c)). The Act requires, however, that in determining the amount of the civil penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct, the degree of culpability, any

history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

I must first categorically state that this is the worst example of horse soring that has ever come before me as an administrative law judge. Respondent's testimony evidences no contrition for his cruelty. He instead argues that his training methods do not constitute soring, principally because he does not use chemicals. His methods are as cruel as any that have come to my attention, and nothing in the evidence mitigates against the imposition of a \$2,000.00 penalty and a one-year disqualification.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends that there is no evidence that the USDA veterinarians who examined "Revelation of Pride" presented "appropriate credentials," as required (15 U.S.C. § 1823(e)). This argument, made for the first time on appeal, comes too late to be considered.² But even if it could be considered, I would infer, in the absence of evidence to the contrary, that the Federal officials properly presented their credentials. See *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). Moreover, even if they had not presented "appropriate credentials" at the time of their examination, they were appropriately identified in the testimony and affidavits at the hearing, and such failure would not have been fatal error.

Respondent contends that the Act is unconstitutional because the requirement that the examination of a horse be conducted within "reasonable limits" and in a "reasonable manner" is too vague. Although an administrative agency has no power to question the constitutionality of a statute under its jurisdiction (*Public Utilities Comm'n of Cal. v. United States*, 355 U.S. 534, 539 (1958)), it is clear that the Act is not unconstitutionally vague.³

Respondent contends that he was "unaware of the importance" of calling his witnesses (Appeal Brief at 3). But even a layman should know that if there are any witnesses to support his case, he should have them testify. Respondent relies on the uncorrected version of the hearing record, which reads (Tr. 121):

² *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, No. 83-1218 (10th Cir. Sept. 8, 1983); *In re Winger*, 38 Agric. Dec. 182, 187 (1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), printed in 36 Agric. Dec. 1642, *aff'd mem.*, 607 F.2d 1097 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

³ See *Lichter v. United States*, 334 U.S. 742, 785-86 (1948); *United States v. Donahue Bros. Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932).

The Court: Well, let me just tell you. You keep mentioning other people who could have testified. If I want them, I'll bring them down.

In accordance with the Rules of Practice (7 CFR § 1.142(a)(3)), the second sentence quoted above was corrected by the ALJ on June 6, 1984, to read, "If you want them, bring them down." There is no basis for challenging this correction of the transcript.

But even if the original version of the record were correct, after the lengthy testimony by Dr. Crichfield against respondent, and the introduction of 19 exhibits by complainant, even a layman should have known that if he had any witnesses, he should produce them.

Furthermore, even at this late date, respondent has not given the name of one witness he should have called, or would like to call at a reopened hearing, or a brief statement of the nature of the testimony he would like to elicit from any witness. Respondent suggests that he would have introduced evidence that he previously had only "one point" assessed against him (Appeal Brief at 4). Since the Department does not have a "point" system, I assume he is referring to one prior warning letter. But, in any event, in the absence of evidence to the contrary, it would be assumed by the ALJ and the Judicial Officer that respondent had committed *no* prior violations.

Respondent also suggests that he would like to show that he "had no intent to hurt a horse—*ever*" (Appeal Brief at 4). But here, again, in the absence of evidence to the contrary, it would be assumed that respondent had no intent to hurt his horse. That is, however, irrelevant since the Act was amended in 1976 for the express purpose of eliminating the need to prove intent. As stated in *In re Stamper*, 42 Agric. Dec. 20, 44-46 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984):

A. Intent.

The Horse Protection Act, as originally enacted in 1970, required proof of intent to sore a horse. Specifically, the statutory definition in the Act provided (15 U.S.C. § 1821(a) (1970)):

(a) A horse shall be considered to be sored if, *for the purpose of affecting its gait—*

(1) a blistering agent has been applied after December 9, 1970, internally or externally to any of the legs, ankles, feet, or other parts of the horse;

(2) burns, cuts, or lacerations have been inflicted after December 9, 1970, on the horse;

(3) a chemical agent, or tacks or nails have been used after December 9, 1970, on the horse; or

(4) *any other cruel or inhumane method or device has been used* after December 9, 1970 on the horse, *including*, but not limited to, *chains* or boots;

which may reasonably be expected (A) to result in physical pain to the horse when walking, trotting, or otherwise moving, (B) to cause extreme physical distress to the horse, or (C) to cause inflammation.
[Emphasis added.]

As set forth in § I, *supra*, the statutory definition as amended in 1976 does not require that the soring agent (such as chains) be used for the purpose of affecting the horse's gait, or that it be reasonably expected to result in physical pain. In view of the contrast between the definition of "sored" in the 1970 Act and in the 1976 amendment now in effect, there is no need to resort to legislative history to show that proof of intent is not now required. But, in any event, the legislative history of the Horse Protection Act Amendments of 1976 shows that Congress specifically intended to eliminate the need to show intent. H. Rep. No. 94-1174, 94th Cong., 2d Sess. 1-2 (1976); S. Rep. No. 94-418, 94th Cong., 1st Sess. 3, 4 (1975). Specifically, it is stated in H. Rep. No. 94-1174, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* [1976] 3 U.S. Code Cong. & Ad. News 1696:

The legislation makes the following substantive modifications in the existing law governing this program:

1. Revises the definition of "sore" under existing law to eliminate the requirement that the soring of a horse must be done with the specific intent or purpose of affecting its gait.

For the foregoing reasons, an owner's or exhibitor's lack of intent to sore a horse is entitled to zero weight in determining whether a violation occurred.

Furthermore, lack of knowledge that the horse was sore, and lack of intent to sore the horse, is not a mitigating circumstance in determining the sanction. As stated in *Stamper, supra*, 42 Agric. Dec. at 62:

Lack of actual knowledge or intent has never been regarded as a circumstance warranting a reduction in the civil penalty since actual knowledge or intent has never been proven in any case, and if lack of actual knowledge or intent were regarded as a mitigating circumstance, the remedial purposes of the Act would not be achieved.

Respondent contends that he was deprived of his constitutional rights because affidavits of five USDA employees were received in evidence, but only one of the employees testified (Appeal Brief at 4). However, respondent stated at the hearing that he had no objection "whatsoever" to the receipt of the exhibits (Tr. 14). Moreover, the testimony of Dr. Crichfield is sufficient by itself to sustain complainant's burden of proof. The other employees were not called because they were no longer with the Department, and their affidavits were introduced solely to prevent an adverse inference from being drawn because of the Department's failure to call them as witnesses (Memorandum in Opposition to Respondent's Motion to Reopen Hearing at 3).⁴

⁴ Adverse inferences are frequently drawn against a party who fails to call a witness who normally would have been expected to testify. *E.g., In re Petty*, 43 Agric. Dec. ____ (Oct. 31, 1984), *appeal docketed*, No. 3-84-2200-R (N.D. Tex.); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983); *In re Farrow*, 42 Agric. Dec. ____ (Sept. 21, 1983), *appeal docketed*, No. 83-2548 (8th Cir. Nov. 18, 1983); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02, *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, No. 83-5098 (3d Cir. Dec. 30, 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-1485 (C.D. Cal. Oct. 20, 1982), *aff'd*, No. 82-6029 (9th Cir. July 20, 1984); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1268 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980); *In re Loretz*, 36

Finally, respondent complains of the delay between the time of the horse show, September 1, 1978, and the hearing, March 27, 1984, which is a period of 5½ years. Although this delay is deplorable, much of it was caused by negotiating with respondent, and then being unable to find respondent after he moved. But, in any event, no prejudice resulted to respondent. Respondent states that he knows "of two witnesses who died during this span" (Appeal Brief at 4). But respondent admitted that they were not "eye witnesses" (Tr. 11). Hence their testimony would not have been helpful to respondent here.

For the foregoing reasons, the following Order should be issued.

ORDER

It is hereby ordered that respondent, E. Digby Palmer, is assessed a civil penalty of \$2,000 which shall be payable to the Treasurer of the United States by certified check or money order.

The certified check or money order shall be forwarded to: Robert A. Ertman, Room 2008-South Building, Office of the General Counsel, United States Department of Agriculture, 14th Street and Independence Avenue, SW., Washington, D.C. 20250, within 60 days from the date this Order becomes final and effective.

It is hereby further ordered that E. Digby Palmer be disqualified for a period of 1 year from showing or exhibiting any horse, and from judging or managing any horse show, exhibition or auction from the date the Order becomes final and effective.

This Order will become final and effective on the day it is served upon respondent.

Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

DISCIPLINARY DECISIONS

In re: MAX BARKLEY, JR. P&S Docket No. 6402. Decided January 7, 1985.

Dealer—Market agency—Registration requirement—Bonding requirement—Accounts and records—Prohibited from business for 28 days—Civil penalty—Consent.

Allan Kahan, for complainant.

Winston Buford, Eminence, Missouri, for respondent

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Max Barkley, Jr., hereinafter referred to as the respondent, is an individual whose mailing address is P.O. Box 86, Winona, Missouri 65588.

2. Respondent is, and at all times material herein was, engaged in the business of buying and selling livestock in commerce for his own account and buying livestock in commerce on a commission basis.

3. Respondent is not registered with the Secretary of Agriculture either as a dealer to buy and sell livestock in commerce, or as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in purported payment for livestock purchased in commerce without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented for payment;

2. Failing to pay, when due, the full purchase price of livestock purchased in commerce.

3. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent, in connection with his operations subject to the Act, shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions subject to the Packers and Stockyards Act and the regulations, including, but not limited to: a general ledger; a ledger showing accounts payable and accounts receivable; a complete livestock purchase and sale journal; and all invoices for livestock purchases and sales.

Respondent Max Barkley, Jr. is prohibited for a period of twenty-eight (28) days from engaging in business or operating subject to the Packers and Stockyards Act as a dealer, buying and selling livestock in commerce either for his own account or as the employee or agent of the vendor or purchaser, or as a market agency, buying or selling livestock in commerce on a commission basis or furnishing stockyard services.

Respondent is hereby assessed a civil penalty of One Thousand Dollars (\$1,000.00).

The provisions of this Order shall become effective on the sixth day after service of this Decision on the respondent.

Copies of this Decision shall be served upon the parties.

In re: STANDISH STOCKYARDS, INC., NORMAN DALE PECK and RAYMOND BALZER. P&S Docket No. 6125. Decided January 10, 1985.

Market agency—Custodial account—Insufficient funds check—Failure to pay when due—Accounts and records—Prohibited from business for 21 days—Consent.

Peter Train, for complainant.

Norman A. Abood, Toledo, Ohio, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO NORMAN DALE PECK

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture. An amended complaint was subsequently filed by the Administrator alleging that the financial condition of Standish Stockyards, Inc., does not meet the requirements of the Act, and that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Norman Dale Peck admits the jurisdictional allegations in paragraph II of the amended complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Norman Dale Peck, hereinafter referred to as respondent Peck, is an individual whose mailing address is 5219 West M 61, P. O. Box 131, Gladwin, Michigan 48624.
2. Respondent Peck was, at all times material herein, the general manager of respondent Standish Stockyards, Inc., and the person responsible for the direction, management and control of respondent Standish Stockyards' operations subject to the Act.
3. Respondent Peck, at all times material herein, was a market agency within the meaning of that term as defined in the Act, and subject to the provisions of the Act.

CONCLUSIONS

Respondent Norman Dale Peck having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Norman Dale Peck, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in his custodial account for shippers' proceeds, within the times prescribed by section 201.42(c) of the regulations (9 CFR § 201.42(c)), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain his custodial account for shippers' proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 CFR § 201.42);

3. Issuing checks in payment of the net proceeds resulting from the sale of livestock on a commission basis without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and

4. Failing to transmit to the owners, shippers or consignors of livestock, when due, the net proceeds resulting from the sale of their livestock.

Respondent Norman Dale Peck shall keep and maintain accounts, records, and memoranda which fully and correctly disclose all transactions involved in his business as a market agency subject to the Act including (1) a currently posted general ledger of accounts showing assets, liabilities, income, expenses and net worth; (2) a currently posted cash receipts and disbursements journal; (3) monthly bank reconciliations; and (4) a current record of outstanding checks drawn on his custodial and general accounts.

Respondent Norman Dale Peck shall not engage in business as a market agency or dealer under the Act for a period of twenty-one (21) days from the effective date of this Order.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this Decision shall be served upon the parties.

In re: PALMER G. HULINGS, RONNIE C. AUSTIN, and GEORGE CLINTON McDONNELL. P&S Docket No. 5744. Decided November 30, 1984.

Dealer—Unfair and deceptive billing practices—Suspension of registration—Cease and desist order—Civil penalty.

Respondent engaged in a scheme to deceive three feedlots as to actual purchase prices and weights of cattle purchased for the feedlots by respondents and "re-invoiced" billings. Respondents were assessed civil penalties, ordered to cease and desist, and suspended for specified periods. This Decision and Order became final January 11, 1985, as to respondent Ronnie C Austin

Allan Kahan, for complainant

Respondent Austin, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under Title III of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229), hereinafter referred to as the Act, instituted by a Complaint filed on March 31, 1980, by the Acting Deputy Administrator, Packers and Stockyards, Agricultural Marketing Service (now the Packers and Stockyards Administration), United States Department of Agriculture.

The complaint charges that respondents Palmer G. Hulings, Ronnie C. Austin, and George Clinton McDonnell entered into and participated in a scheme to deceive three feedlots in Nebraska as to the actual purchase prices and weights of cattle purchased for the feedlots by respondents. The complaint further charges that respondents obtained blank invoices from the markets where they purchased cattle and "re-invoiced" and raised the actual purchase prices and weights. These actions are alleged to be in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.44 and 201.55 of the regulations (9 CFR §§ 201.44 and 20.55).

On April 30, 1980, respondent Palmer G. Hulings, by his attorneys, filed his Answer in which he admitted that the Secretary had jurisdiction over him and denied the remaining allegations of the complaint. On June 16, 1980, respondent George Clinton McDonnell filed a letter in answer to the complaint which was largely explanatory. On June 25, 1980, respondent Ronnie C. Austin filed a letter in answer to the Complaint in which he denied the allegations and moved for its dismissal.

The oral hearing of this matter commenced on May 12, 1982 in the Bankruptcy Court, Courtroom 3, Federal Building, Lincoln, Ne-

braska, before Administrative Law Judge John G. Liebert, and continued through May 24, 1982. Respondent Hulings was represented by Daniel W. Olsen of Deas, Van Hooser & Olsen, P.C., Kansas City, Missouri. Respondents Austin and McDonnell appeared *pro se*. Complainant was represented by Allan R. Kahan, Office of the General Counsel, United States Department of Agriculture, Washington, D. C.

Complainant called 12 witnesses and offered 40 exhibits. Respondent Hulings called 2 witnesses and offered no exhibits. The hearing transcript comprises 528 pages.

On August 13, 1984, after the filing of proposed findings of fact, conclusions and supporting briefs on behalf of complainant and respondent Hulings, the proceeding was reassigned to Administrative Law Judge Victor W. Palmer. The reassignment was necessitated by the grave illness and subsequent demise of Judge Liebert. A telephone conference was held on September 26, 1984 in which the reassignment was discussed with the parties. The parties all agreed that Judge Palmer should decide the case upon the basis of the existing record evidence, but asked for additional time to discuss again settlement possibilities. It was understood that if settlement negotiations were not successfully completed on or before October 12, 1984, Judge Palmer would thereupon review the record and enter a decision and order unless he found that oral argument by telephone was needed for clarification of the issues. One of the respondents, George Clinton McDonnell, on October 23, 1984, consented to the entry of a stipulated decision and order. The remaining respondents have not reached any agreement with the complainant.

Upon review of the record and the written briefs and arguments of the parties, it has been concluded that oral argument is not needed to elucidate the issues. It has further been concluded that an order should be entered against respondent Palmer G. Hulings requiring him to cease and desist from specified unfair and deceptive billing practices, suspending him as a registrant under the Act for 45 days, and assessing a civil penalty against him of \$3,000; and that an order should be entered against respondent Ronnie C. Austin requiring him to cease and desist from specified unfair and deceptive billing practices, suspending him as a registrant under the Act for 22 days, and assessing a civil penalty against him of \$1,000.

FINDINGS OF FACT

1. Respondent Palmer G. Hulings, mailing address Route 1, Lancaster, Kansas 65041, is an individual who, at all times material herein, was:

(a) engaged in the business of buying and selling livestock in commerce for his own account as H & H Cattle Co., and,

(b) registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency selling livestock on a commission basis.

2. Respondent Ronnie C. Austin, mailing address Route 1, Ringling, Oklahoma 73456, is an individual who, at all times material herein, was:

(a) engaged in the business of buying livestock on a commission basis as an agent, and,

(b) registered with the Secretary of Agriculture as a dealer buying livestock for slaughter purposes.

3. Respondent George Clinton McDonnell, mailing address 205 Center Street, Whitesboro, Texas 76273, is an individual who, at all times material herein, was:

(a) engaged in the business of buying and selling livestock in commerce for his own account, and

(b) registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

4. During the period May through August 1977, respondent Hulings had orders to purchase feeder cattle for three feedlots in Nebraska; namely: Grosserode Cattle Company, Milford, Nebraska; Olson Feed Yard, Holdrege, Nebraska; and Will Feed, Inc., Cozad, Nebraska. The arrangement or contractual understanding each feedlot had with respondent Hulings was not written. It was the understanding of the parties that respondent Hulings would purchase and assemble in truckload lots, cattle meeting certain specifications.

5. Respondent Hulings held himself out to be operating as an order buyer during the time in question, filling the orders of his feedlot clients pursuant to their instructions. All three feedlots paid respondent Hulings a commission of 25¢ per hundredweight (later 35¢) for his services, in addition to the cost of the livestock, as well as any expenses incidental to the procurement of the cattle. The feedlots expected that they would receive the benefit of any price advantage. However, respondent Hulings permitted the three feedlots to reject cattle that did not meet their specifications and, in this sense, acted in the manner of a dealer purchasing cattle for his own account for resale to the three feedlots.

6. Because respondent Hulings was unable to obtain, without assistance, all of the livestock needed to fill the feedlots' orders, some of the cattle were purchased for him by respondents Ronnie C. Austin and George Clinton McDonnell.

7. Respondent Austin purchased cattle on a commission basis for Hulings. Austin purchased cattle at Ardmore Livestock Auction, Ardmore, Oklahoma, on Mondays; at Waurika Livestock Market, Waurika, Oklahoma, on Tuesdays, until respondent Hulings arrived; at Farmers and Ranchers Stockyard, Comanche, Oklahoma, on Wednesdays; at Ringling Livestock Auction, Ringling, Oklahoma, on Thursdays, and occasionally at Apache Livestock Sales, Inc., Apache, Oklahoma.

8. Respondent McDonnell purchased livestock for respondent Hulings at Muenster Livestock Commission Company, Muenster, Texas, and at Wichita Livestock Auction, Wichita Falls, Texas.

9. For most of the sales in question, invoices were prepared pursuant to instructions by respondent Hulings in the following manner:

(a) Blank invoices were obtained at the various markets where cattle were purchased (some were simply picked up, others were provided by a market employee upon request);

(b) An amount was added to the initial purchase price of the livestock which covered the buying commission for the person who purchased the cattle for respondent Hulings, and all other of Hulings' expenses including trucking and his losses on cattle cut from previous loads and resold at a loss;

(c) The adjusted price which included the buying commission, other expenses, and enhanced profits to Hulings beyond the agreed rate of commission, was entered on the blank invoices. The newly prepared invoices were sent to the feedlot buyers along with a recap sheet prepared by respondent Hulings. Each of the recap sheets represented the cattle which were put together to make up one truckload and the recap sheets listed each group of cattle put together to make up the load with entries showing their place of original purchase.

10. Grosserode Cattle Company and Will Feed, Inc., required that the purchase invoices be sent to them along with the recap sheet. Both of these feedlots used the purchase invoices to determine the origin of the cattle, the date they were purchased, and their actual cost when purchased by respondent Hulings.

11. The third feedlot, Olson Farms, did not request that any invoices be provided with the recap sheet.

12. Respondent Hulings' additions to prices of livestock as recorded on the invoices prepared pursuant to his instructions were arbitrary and inconsistent, varying from transaction to transaction.

13. Respondent Hulings also added arbitrary weights to various of the cattle that were reinvoiced. Specifically, Hulings admitted that he reported higher weights to his feedlot clients than the purchase weights in each of the following transactions in which Hulings had not reweighed the cattle:

(1977) Date of pur- chase	Date of sale	For whom purchased	No head	Market where purchased	Actual weight	In- voiced weight	Weight mark- up (lbs.)
6-9	6-9	Grosserode Cattle Co	1	Muenster Livestock Comm Co	485	525	40
7-14	7-15	Grosserode Cattle Co	6	Muenster Livestock Comm. Co.	3385	3505	120
7-19	7-19	Will Feed, Inc.	11	Waurika Livestock Market	6545	6595	50
8-2	8-4	Olson Feed Yard	4	Waurika Livestock Market	2330	2435	105

14. The three feedlot owners testified they were, in general, satisfied with their transactions with respondent Hulings.

CONCLUSIONS

Respondent Palmer G. Hulings willfully violated the Packers and Stockyards Act, 1921, by engaging, repeatedly, in the unfair and deceptive practice of increasing prices and adding arbitrary weights on "re invoiced" billings to his customers for whom he was buying livestock on a commission basis as an order buyer (7 U.S.C. § 213(a)).

An order directing Palmer G. Hulings to cease and desist from continuing these violations of the Act is needed to prevent future occurrences (7 U.S.C. § 213(b)). Furthermore, upon consideration of the gravity of the offense, the size of Palmer G. Hulings' business and the effect on his ability to continue in business, it is appropriate to assess a civil penalty of \$3,000 for his violations (7 U.S.C. § 213(b)). It is also appropriate to suspend Palmer G. Hulings as a registrant under the Act for a period of 45 days (7 U.S.C. § 204).

Respondent Ronnie C. Austin willfully violated the Packers and Stockyards Act, 1921, by aiding and participating, repeatedly, in the unfair and deceptive practice of "re invoicing" billings to Hulings' customers for whom Hulings was buying livestock on a commission basis as an order buyer, under circumstances in which

Austin knew inflated purchase prices were being reported to Hulings' clients (7 U.S.C. § 213(a)). An order directing Ronnie C. Austin to cease and desist from continuing these violations of the Act is needed to prevent future occurrences (7 U.S.C. § 213(b)). Furthermore, upon consideration of the gravity of the offense, the size of Austin's business and the effect on his ability to continue in business, it is appropriate to assess a civil penalty of \$1,000 for his violations (7 U.S.C. § 213(b)). It is also appropriate to suspend Ronnie C. Austin as a registrant under the Act for a period of 22 days.

DISCUSSION

The parties dispute whether respondent Palmer G. Hulings was acting as a market agency buying for clients on commission or as a dealer selling on his own account. This distinction is immaterial to whether or not a violation occurred.

Registrants under the Act are required to furnish honest and accurate invoices and other documents when they act in either capacity. *William E. Hatcher*, 41 Agric. Dec. 662 (1982); *Sidney D. Collier*, 38 Agric. Dec. 957 (1979); *Eric Loretz*, 36 Agric. Dec. 1087 (1977); *Arnold Fairbank, d/b/a/ Arnold Fairbank Cattle Co.*, 27 Agric. Dec. 1371 (1968), *aff'd* 9th Cir. 1970, 29 Agric. Dec. 601; *Boone Livestock Co.*, 27 Agric. Dec. 475 (1968). *See also*, 9 CFR §§ 201.44 and 201.55.

It is axiomatic, therefore, that Hulings violated the Act by his deceptive re invoicing of cattle purchases to disguise actual purchase prices and weights from his feedlot cutomers. These deceptive practices require the entry of a cease and desist order to preclude Hulings from engaging in such conduct in the future.

Hulings, however, was not, in fact, dealing with the feedlots at arm's length but was acting as a market agency buying cattle for them on commission, which heightens the gravity of his offense and must be considered in determining the appropriate sanctions to be imposed.

Even though Hulings allowed the feedlots to reject cattle not meeting their specifications, which normally is a characteristic of a dealer transaction, the evidence of record makes it clear that Hulings was nonetheless holding himself out to be acting as the feedlots' order buyer. His compensation was understood to solely consist of the 25¢ per head, later 35¢ head, commission shown on the invoices. The feedlot operators testified that they entered into their arrangements with Hulings because they understood he would be acting on their behalf as an agent who would secure for them the full benefits of any favorable deals he was able to make. The fact that Hulings permitted his clients to reject cattle was obviously an

uneconomic practice for an order buyer whose only compensation was based on a fixed rate of commission on only those cattle his clients accepted. But, as stated in *Hatcher, supra* at 666, which involved the use of "counterfeit" invoices by an order buyer to increase the prices and weights reported to his client to offset the client's alleged arbitrary reduction of commissions and fees: "yield(ing) to economic pressures . . . is irrelevant to the . . . violation, and also largely unpersuasive and irrelevant . . . (to) any sanction applicable. . . ."

As an order buyer, Hulings was entitled to charge his clients for his additional expenses, including additional commissions paid to others helping him to assemble cattle for shipment to the feedlots. Mr. Hulings was obliged, however, to specify such added charges on the invoices he sent to his clients and not conceal them or disguise them by altering the actual weights and prices paid for the cattle. Although testimony was elicited from the feedlots at the hearing that they would not have objected to such charges being passed on to them, apparently Hulings believed he could better maintain client satisfaction by concealing them. It is his use of deception in re-invoicing the cattle that is the gravamen of the violations charged and found.

Respondent Ronnie C. Austin participated in the deception by obtaining blank invoices which Mr. Austin's wife used to "reinvoice" cattle purchased for Hulings' clients. The re-invoicing was performed by Mrs. Austin pursuant to Hulings' directions and for a fee. It is clear, under these circumstances, that respondent Austin knew of Hulings' deceptive practices and was a willing participant. He, therefore, violated his obligations as a registrant under the Act by engaging in unlawful and deceptive practices and should likewise be subject to a cease and desist order to preclude future occurrences.

In assessing a civil penalty of \$3,000 and suspending Palmer G. Hulings as a registrant under the Act for a period of 45 days, I have taken into consideration the fact that his clients were generally satisfied with the transactions despite his deceptive invoicing practices. The size of his business and the effect of such sanctions upon his ability to continue in business have also been considered. These considerations have persuaded me against imposing harsher sanctions as was done in the factually similar *Hatcher* case, *supra*.

Respondent Ronnie C. Austin is a young family man of apparently modest income who made a very serious mistake at the start of his chosen career. He was a participant but not an instigator. He should not be sanctioned so severely as to be unable to continue in business. Accordingly, it has been concluded that a civil penalty of

\$1,000 and a suspension as a registrant under the Act for a period of 22 days is the appropriate sanction.

For the foregoing reasons, the following Order is being entered.

ORDER

Respondents Palmer G. Hulings and Ronnie C. Austin, individually and as partners, or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Misrepresenting to their principals (a) the original purchase weights or the original purchase prices for livestock purchased on a commission basis, or (b) the existence and true nature of charges made for their services;

2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, or any other document showing false, inaccurate, or misleading weight or price entries for such livestock;

3. Collecting payment from the purchasers of livestock on the basis of false, inaccurate, or misleading weight or price entries on accounts of purchase, invoices, or billings; and

4. Inserting or failing to insert in accounts of purchase, invoices, billings, or any other document prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole or in part, in a false, inaccurate or misleading record is made, wholly or in part, of such livestock purchase or sale transaction.

Respondent Hulings is suspended as a registrant under the Act for a period of forty-five (45) days, and is assessed a civil penalty of three thousand dollars (\$3,000).

Respondent Austin is suspended as a registrant under the Act for a period of twenty-two (22) days, and is assessed a civil penalty of one thousand dollars (\$1,000).

Said civil penalties shall be paid by certified check payable to the "Treasurer of the United States" and shall be mailed to and received by complainant by the effective date of this Decision.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on respondents unless appealed to the Secretary by a party to the proceedings within thirty (30) days after service, as provided in Section 1.145 of the Rules of Practice (7 CFR § 1.145).

[This Decision and Order became final January 11, 1985.—Ed.]

In re: HEINHOLD HOG MARKET, INC., and BENJAMIN J. SMITH. P&S
Docket No. 6479. Decided January 11, 1985.

Dealer—False and incorrect weights—Misrepresenting origin of livestock—
Suspension of registration, in abeyance—Civil penalty—Consent.

Jory Hochberg and Allan Kahan, for complainant.

John H. Witner, Jr., for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO HEINHOLD HOG MARKET, INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 et seq.) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 CFR § 201.1 et seq.), hereinafter referred to as the regulations. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Heinold admits the jurisdictional allegations in paragraph I of the complaint as those allegations pertain to it, and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. (a) Heinold Hog Market, Inc., hereinafter referred to as respondent Heinold, is a corporation organized and existing under the laws of the State of Delaware. The business mailing address of its corporate headquarters is Box 375, Kouts, Indiana 46347.

2. (b) Respondent Heinold is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for its own account, and buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock in commerce.

CONCLUSIONS

Respondent Heinold having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Heinold, its officers, directors, agents, and employees, directly or through any corporate or other device, shall cease and desist from:

1. Weighing livestock at other than their true and correct weights;
2. Paying the sellers of livestock on the basis of false and incorrect weights;
3. Collecting from the purchasers of livestock on the basis of false and incorrect weights;
4. Failing to maintain and operate livestock scales owned or controlled by the respondent in such manner as to insure accurate weights or otherwise failing to weigh livestock in strict conformity with the requirements of section 201.73-1 of the regulations;
5. Preparing invoices or any other document in connection with the purchase or sale of livestock which purport to show the livestock as having been weighed and placed by the respondent into different weight ranges unless such weight ranges represent actual weights obtained from livestock being placed on the scale unless otherwise expressly agreed to in writing by the parties to the purchase or sale;
6. Preparing invoices or any other documents in connection with the sale of livestock which misrepresent the origin of the livestock;
7. Paying for livestock or collecting payment for livestock on the basis of weight ranges unless such weight ranges represent actual weights obtained from the weighing of livestock unless otherwise expressly agreed to in writing by the parties to the purchase or sale;
8. Making or issuing or causing to be made or issued, false, incorrect, or inaccurate entries in scale tickets, invoices or any other documents evidencing or preparing in connection with the purchase or sale of livestock;
9. Issuing or causing to be issued invoices or any other documents prepared in connection with the purchase or sale of livestock which fail to show the true and correct weights of such livestock and all other facts necessary to show clearly and completely the true nature of the transaction; and

10. Collecting or aiding and assisting any person to collect from the purchasers of livestock on the basis of false, incorrect, or inaccurate invoices or accountings.

Respondent Heinold shall keep and maintain accounts, records, and memoranda which fully and correctly disclose the true nature of all transactions involved in its businesses subject to the Packers and Stockyards Act, including, but not limited to: (1) scale tickets issued in serially numbered sequence which show the name and address of the issuing buying station or a designation sufficient to identify the buying station; and (2) documents sufficient to show the number of head of livestock transferred into or out of each buying station and the date of transfer.

Respondent Heinold is suspended as a registrant under the Packers and Stockyards Act for a period of one year; PROVIDED, however, that this suspension period is held in abeyance except with respect to respondent's Prescott station.

In accordance with section 312(b) of the Act (7 U.S.C. 213(b)), respondent is assessed a civil penalty in the amount of forty-five thousand dollars (\$45,000).

Respondent shall obtain a signed acknowledgment from all of its buying station managers that they have read this Decision and Order. Respondent shall maintain an ongoing information program for all officers, divisions managers, and buying station managers designed to insure that such persons are aware of the requirements of this Decision and Order, including, but not limited to, delivering a copy of Section 201.73-1 of the regulations to all buying station managers and obtaining signed acknowledgments from newly hired station managers, for at least three years from the effective date of this order, that they have read this Decision and Order.

Respondent shall, within sixty (60) days after service of this Decision and Order, file with the Branch Chief, Scales and Weighing Branch, Room 3412 South Building, Packers and Stockyards Administration, U.S. Department of Agriculture 20250 a written report setting forth in detail the manner and form of their compliance with the order herein.

The provisions of this Order shall become effective on the sixth (6th) day after it is served on the respondent.

Copies hereof shall be served of the parties.

In re: CORA B. RAASCH. P&S Docket No. 6465. Decided January 18, 1985.

Dealer—Market agency—Bonding—Cease and desist order.

Stephen Luparello, for complainant.
Respondent Austin, pro se

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Respondent Cora B. Raasch, doing business as C-B Livestock Company, hereinafter referred to as the respondent, is an individual whose business mailing address is 501 South Broadway, Scottsbluff, Nebraska 69361.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for her own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce, and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Cora B. Raasch, individually or through any corporate or other device, in connection with her activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this Decision shall be served upon the parties.

*In re: C & H CATTLE COMPANY INC., and CALVIN HENIFIN. P&S
Docket No. 6232. Decided January 22, 1985.*

Dealer—Market Agency—Bonding—Suspension of registration.

Jory Hochberg, for complainant

Roger L. Kromer, Portland, Oregon, for respondents.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint as set forth below and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. C&H Cattle Company, hereinafter referred to as the corporate respondent, is a corporation with a business mailing address of 8122 S.E. Lake Road # 20, Milwaukie, Oregon 97222.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis;

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce, and as a market agency to buy livestock in commerce; and

(c) The successor to the previous livestock operations of Calvin W. Henifin.

3. Calvin W. Henifin, hereinafter referred to as respondent Henifin, is an individual whose business mailing address is 8122 S.E. Lake Road # 20, Milwaukie, Oregon 97222.

4. Respondent Henifin is, and at all times material herein was:

(a) President and a director of the corporate respondent;

(b) Owner of 90% of the stock issued by the corporate respondent;

(c) Responsible for the direction, management and control of the corporate respondent;

(d) Engaged in the business of buying livestock in commerce on a commission basis; and

(e) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce, and as a market agency to buy livestock in commerce.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent C&H Cattle Company, Inc., its officers, directors, agents, employees, successors and assigns, directly or indirectly through any corporate or other device, and respondent Calvin Henifin, his agents and employees, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a rea-

sonable bond or its equivalent, as required by the Act and the regulations.

Respondents C&H Cattle Company, Inc., and Calvin W. Henifin are suspended as registrants under the Act for a period of one year and thereafter until such time as they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension after the expiration of the one year period.

PROVIDED, however, that once respondents have demonstrated that they are in full compliance with the bonding requirements of the Act and regulations, and after the respondents have served the initial sixty days of the one year period of suspension, the remainder of the suspension will be held in abeyance unless the respondents, after being afforded an opportunity for hearing, are found to have engaged in the practices alleged in the complaint within that remaining period. This shall not be construed as a stipulated sanction for such future violations, however, and complainant shall be free to seek additional sanctions for such new violations.

Respondent Calvin Henefin acknowledges and agrees that this order prohibits him from acting as an officer, employee or agent of a stockyard owner, packer, market agency or dealer performing activities in connection with livestock transactions in commerce during the active portion of his suspension.

Respondent Henefin further acknowledges and agrees that once he has served the initial sixty days of the above suspension, he may serve as a salaried employee of a packer, market agency or dealer, but may not operate as a market agency buying livestock on commission until he obtains an adequate bond or its equivalent as required by the Act and regulations.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

Copies of this Decision shall be served upon the parties.

In re: ROYAL J. ALEXANDER and ALPHA B. ALEXANDER. P&S Docket No. 6405. Decided December 12, 1984.

Market agency—Bonding—Cease and desist order—Suspension of registration—
Civil penalty—Default.

Peter V. Train, for complainant
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF
DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and regulations promulgated thereunder (9 CFR § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 CFR § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to Section 1.139 of the Rules of Practice (7 CFR § 1.139).

FINDINGS OF FACT

1. (a) Royal J. Alexander and Alpha B. Alexander, hereinafter referred to as respondents, are partners doing business as LaFontaine Livestock Sale. Their business mailing address is 203 S. Walnut, Box 222, LaFontaine, Indiana 46940.

(b) Respondents are, and at all times material herein were:

(1) Engaged in the business of conducting and operating the LaFontaine Livestock Sale stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

2. Respondents were notified on June 16, 1984, that the \$45,000.00 surety bond maintained to secure the performance of their livestock obligations under the Act would be terminated effective July 13, 1984, and that if they continued their livestock operations without adequate bond coverage or its equivalent, they would be in violation of section 312(a) of the Act and sections 201.29 and 201.30 of the regulations promulgated thereunder. Notwithstanding such notice, respondents have continued to engage in the business of a market agency, selling livestock in commerce on a commission basis, without filing and maintaining a reasonable bond or its equivalent, as required under the Act and the regulations.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondents have wilfully violated Section 312(a) of the Act (7 U.S.C. § 213(a)), and Sections 201.29 and 201.30 of the regulations (9 CFR §§ 201.29, 201.30).

ORDER

Respondents Royal J. Alexander and Alpha B. Alexander, their agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required under the Act and the regulations.

Respondents are suspended as a registrant under the Act until they comply fully with the bonding requirements under the Act and the regulations. When respondents demonstrate that they are in full compliance with such requirements, a supplemental order will be issued in this proceeding terminating the suspension.

In accordance with Section 312(b) of the Act (7 U.S.C. § 213(b)), respondents are jointly and severally assessed a civil penalty in the amount of One Thousand Seven Hundred and Fifty Dollars (\$1,750.00).

This Decision and Order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 CFR §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and Order became final January 23, 1985.—Ed.]

In re: PAUL J. SPENCE. P&S Docket No. 6456. Decided January 23, 1985.

Dealer—Bonding—Cease and desist order—Suspension of registration—Civil penalty—Consent.

Barbara Harris, for complainant
Respondent, pro se.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Respondent Paul J. Spence is an individual whose business mailing address is 1323 W. Locust, Room 23, Springfield, Missouri 65803.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such Decision will be entered.

ORDER

Respondent Paul J. Spence, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with Section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

In re: RECTOR AUCTION SALE BARN, INC., P&S Docket No. 6462. Decided January 23, 1985.

Dealer—Bonding—Cease and desist order—Suspension of registration—Civil penalty—Consent.

Allan Kahan, for complainant.

Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This Decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure,

and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Rector Auction Sale Barn, Inc., hereinafter referred to as the respondent, is a corporation with its principal place of business located at Rector, Arkansas. Respondent's business mailing address is P. O. Box 72, Hwy. 49, Rector, Arkansas 72461.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce, and as a market agency selling livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Rector Auction Sale Barn, Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations as a dealer or market agency subject to the Act, shall cease and desist from engaging in business subject to the Act without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until such time as it complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that it is in compliance with such bonding requirements, a Supplemental Order will be issued in this proceeding terminating the suspension.

In accordance with Section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

In re: JOE GRINSTEAD. P&S Docket No. 6466. Decided January 29, 1985.

Dealer—Market agency—Insufficient funds check—Failure to pay when due—
Cease and desist order—Suspension of registration—Consent.

Stephen Lupparello, for complainant

Respondent, pro se

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Joe Grinstead, doing business as Joe Grinstead Farms, herein-after referred to as the respondent, is an individual whose business address is R.R. #4, Box 289, Sheridan, Indiana 46069.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and for the accounts of others; and

(b) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce for his own account, and as a market agency buying livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Joe Grinstead, his agents and employees, directly or indirectly, through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the accounts upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, for livestock purchased;
3. Failing to pay for livestock.

Respondent is suspended as a registrant under the Act for a period of one hundred and twenty (120) days.

The provisions of this Order shall become effective on the sixth day after service on this Order on the respondent.

Copies of this Decision shall be served on the parties.

*In re: HEINHOLD HOG MARKET, INC., and BENJAMIN J. SMITH. P&S
Docket No. 6479. Decided February 4, 1985.*

Dealer—False and incorrect weights—Misrepresenting origin of livestock—
Suspension of registration—in abeyance—Civil penalty—Consent.

*Jory Hochberg and Allan Kahan, for complainant.
Thomas A. Lovell, Clear Lake, Iowa, for respondent.*

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION WITH REGARD TO BENJAMIN J. SMITH

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 CFR § 201.1 *et seq.*), hereinafter referred to as the regulations. This Decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Smith admits the jurisdictional allegations in paragraph I of the complaint as those allegations pertain to him, and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and

agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Benjamin J. Smith, hereinafter referred to as respondent Smith, is an individual whose address is Apt. D-1, Highland Terrace, Charles City, Iowa 50616.

2. Respondent Smith, during the period from approximately June 1, 1982, through approximately July 1, 1984, was manager of respondent Heinold Hog Market Inc.'s buying station located at Prescott, Iowa.

3. Respondent Smith, at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce as an employee of the vendor or purchaser; and

(2) A dealer within the meaning and subject to the provisions of the Act.

CONCLUSIONS

Respondent Smith having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Smith, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Weighing livestock at other than their true and correct weights;

2. Paying the sellers of livestock on the basis of false and incorrect weights;

3. Collecting from the purchasers of livestock on the basis of false and incorrect weights;

4. Failing to maintain and operate livestock scales owned or controlled by the respondent in such manner as to insure accurate weights or otherwise failing to weigh livestock in strict conformity with the requirements of section 201.73-1 of the regulations;

5. Preparing invoices or any other document in connection with the purchase or sale of livestock which purport to show the livestock as having been weighed and placed by the respondent in different weight ranges unless such weight ranges represent actual weights obtained from livestock being placed on the scale or unless otherwise expressly agreed to in writing by the parties to the purchase or sale;

6. Preparing invoices or any other documents in connection with the sale of livestock which misrepresent the origin of the livestock;

7. Paying for livestock or collecting payment for livestock on the basis of weight ranges unless such weight ranges represent actual weights obtained from the weighing of livestock unless otherwise expressly agreed to in writing by the parties to the purchase or sale;

8. Making or issuing or causing to be made or issued false, incorrect, or inaccurate entries in scale tickets, invoices or any other documents evidencing or prepared in connection with the purchase or sale of livestock;

9. Issuing or causing to be issued invoices or any other documents prepared in connection with the purchase or sale of livestock which fail to show the true and correct weights of such livestock and all other facts necessary to show clearly and completely the true nature of the transaction; and

10. Collecting or aiding and assisting any person to collect from the purchasers of livestock on the basis of false, incorrect, or inaccurate invoices or accountings.

Respondent Smith shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Packers and Stockyards Act, including, but not limited to: (1) scale tickets issued in serially numbered sequence which show the name and address of the issuing buying station or a designation sufficient to identify the buying station; and (2) load out sheets and worksheets prepared by the respondent.

Respondent Smith shall not operate as a dealer or as a market agency subject to the Act or serve as an employee or agent of a dealer or a market agency subject to the Act for a period of eighteen (18) months.

The provisions of this Order shall become effective on the sixth day after it is served on the respondent.

Copies hereof shall be served on the parties.

In re: SOUTHWESTERN SALES COMPANY, INC. P&S Docket No. 6476.
Decided February 8, 1985.

Market agency—Bonding—Cease and desist order—Civil penalty—Consent.

Stephen Luparello, for complainant

Robert T. Keeton, Huntingdon, Tennessee, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Southwestern Sales Company, Inc., hereinafter referred to as the respondent, is a corporation with its principal place of business located at Huntingdon, Tennessee. Respondent's business mailing address is Highway 70 East, Huntingdon, Tennessee 38344.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Southwestern Sales Company, Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, herein referred to as the stockyard;

(b) Engaged in the business of a market agency, selling livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Southwestern Sales Company, Inc., its agents and employees, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Act and the regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and regulations.

Insofar as respondent is now in full compliance with the bonding requirements under the Act and the regulations, no suspension is warranted.

Respondent is assessed a civil penalty in the amount of Six Hundred and Fifty Dollars (\$650.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies hereof shall be served upon the parties.

In re: GOTHAM PROVISION COMPANY, INC., P&S Docket No. 6439. Decided February 11, 1985.

Packer—Insufficient funds check—Failure to pay when due—Cease and desist order—Civil penalty—Consent.

Roberta Swartzendruber, for complainant.

Vern L. Freeland, Miami, Florida, for respondent.

Decision by Edward H. McGrail, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act. This Decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit or deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Gotham Provision Company, Inc., hereinafter referred to as the corporate respondent, is a North Carolina corporation with its principal place of business located at Swannanoa, North Carolina. Corporate respondent's business mailing address is P. O. Box 9238, Asheville, North Carolina 28815.

2. The corporate respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Warren B. Moore, hereinafter referred to as the individual respondent, owns 100% of the stock and is president of the corporate respondent.

4. The individual respondent directs, manages and controls all business activities of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, and the individual respondent, directly or through any corporate or other device, in connection with his business subject to the Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Issuing post-dated checks in payment for livestock,

Respondents are assessed jointly and severally a civil penalty in the amount of Two Thousand Five Hundred Dollars (\$2,500.00).

The provisions of this Order become effective on the first day after service of this Decision on the respondents.

Copies hereof shall be served upon the parties.

In re: GARY WILSON. P&S Docket No. 6408. Decided February 14, 1985.

Packer—Failure to pay full purchase price—Failure to remit funds to seller—Civil penalty—Consent.

Thomas Heinz, for complainant.

Ronnie C. Batchelor, Decatur, Georgia, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent violated the Act. This Decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Gary Wilson, hereinafter referred to as the respondent, is an individual who resides at 699 Rockborough Drive, Stone Mountain, Georgia 30083.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of marketing meats, meat food products, poultry and poultry products acting as a wholesale broker, dealer or distributor in commerce under the names "Wilson Brokerage Company" and "G & W Meats"; and

(b) A packer, within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent, in connection with his packer operations, shall cease and desist from:

1. Failing to pay the full purchase price of meat, meat food products, poultry or poultry products; and

2. Converting or causing the conversion of sale proceeds to his own use instead of directing the sale proceeds to the seller in any transaction in which respondent acts as a broker.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent is hereby assessed a civil penalty of ten thousand dollars (\$10,000.00)

The provisions of this Order shall become effective on the first day after service of this order on the respondent.

Copies of this Decision shall be served upon the parties.

In re: ORANGE MEAT PACKING Co., INC., and G. & L. PACKING Co., INC. P&S Docket No. 5717. Decided February 27, 1985.

Packer—Insufficient funds check—Failure to pay when due—Failing to hold funds in trust—Cease and desist—Consent.

Barbara Harris, for complainant.

Keith Wolfe, Syracuse, New York, for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION WITH REGARD TO ORANGE MEAT PACKING CO., INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint and Notice of Hearing filed by the then Acting Deputy Administrator, Packers and Stockyards, AMS, United States Department of Agriculture, now Packers and Stockyards Administration, alleging that the respondents' financial condition does not meet the requirements of the Act and that the respondents violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This Decision is entered pursuant to the consent decision provisions of the rules of practice applicable to this proceeding (7 CFR 1.138).

Respondent Orange Meat Packing Co., Inc., admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admits the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Orange Meat Packing Co., Inc., hereinafter referred to as respondent Orange, is a corporation organized and existing under the laws of New York with its principal place of business located at Syracuse, New York. Its mailing address is 1410 Jamesville Avenue, P.O. Box 45, Syracuse, New York 13205.

2. Respondent Orange, at all times material herein, was:

(a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act

(c) The average annual purchases of livestock by respondent Orange exceeded \$500,000.00.

CONCLUSIONS

Respondent Orange having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Orange Meat Packing Co., Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with respondent's operations as a packer, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented for payment;

2. Failing to pay, when due, the full purchase price of livestock;

3. Failing to hold in trust funds required to be held in trust for the benefit of all unpaid cash sellers of livestock, pursuant to section 206(b) of the Packers and Stockyards Act (7 U.S.C. 196(b)); and

4. Purchasing livestock for slaughter while respondent's current liabilities exceed its current assets, unless respondent pays the full purchase price of the livestock at the time of purchase in cash, by certified check, or by wire transfer of funds to the seller or the seller's duly authorized representative at the time of transfer of possession of the livestock to the respondent.

The provisions of this Order shall become effective on the first day after service of this Order on the respondent Orange.

Copies of this decision shall be served upon the parties.

In re: FREDERICKTOWN AUCTION Co., INC. P&S Docket No. 6414. Decided February 27, 1985.

Dealer—Market agency—Bonding—Cease and desist—Civil penalty—Consent.

Jory Hockberg, for complainant.

Robin E. Fulton, Fredericktown, Missouri, for respondent

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Fredericktown Auction Co., Inc., hereinafter referred to as the respondent, is a corporation with its principal place of business in Fredericktown, Missouri. Respondent's business mailing address is P. O. Box 401, Fredericktown, Missouri 63645.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Fredericktown Auction Co., Inc., stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard and buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce for its own account and

as a market agency selling livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Fredericktown Auction Co., Inc., its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

In accordance with Section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Four Hundred Dollars (\$400.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this Decision shall be served upon the parties.

In re: NORMAN W. WAITT. P&S Docket No. 6419. Decided February 27, 1985.

Dealer—Market agency—Insufficient funds check—Failure to pay when due—
Failure to pay full price—Issuing drafts without written agreements from sellers—Suspension of registration—Consent.

Ben E. Bruner, for complainant.

David R. Crary, Sioux City, Iowa, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This Decision is entered pursuant to the consent decision pro-

visions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Norman W. Waitt, hereinafter referred to as the respondent, is an individual doing business as N. W. Cattle Company whose business mailing address is Box 2477 Stockyards Station, Sioux City, Iowa 51107.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account;

(b) Engaged in the business of buying livestock in commerce on a commission basis; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Norman Waitt, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

2. Failing to honor and make funds available to pay drafts issued for livestock when such drafts are presented for payment;

3. Failing to pay, when due, the full purchase price of livestock;

4. Failing to pay the full purchase price of livestock; and

5. Issuing drafts which are not checks in payment for livestock without obtaining, before the transactions, written agreements from the sellers that payment may be made by draft.

Respondent is suspended as a registrant under the Act for a period of 90 days.

The provisions of this Order shall become effective on May 1st, 1985.

Copies of this Decision shall be served upon the parties.

In re: JIMMY HIGGINS. P&S Docket No. 6415. Decided February 28, 1985.

Dealer—Bonding—Cease and desist—Civil penalty—Consent.

Thomas Heinz, for complainant.

D. Russell Thomas, Murfreesboro, Tennessee, for respondent

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This Decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

1. Jimmy Higgins, doing business as Higgins Livestock, hereinafter referred to as the respondent, is an individual whose mailing address is P.O. Box 396, Woodbury, Tennessee 37190.

2. Respondent is, and at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Jimmy Higgins, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Inasmuch as respondent has demonstrated that he is in full compliance with the bonding requirements under the Act and the regulations, no suspension of his registration is warranted.

In accordance with Section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is assessed a civil penalty in the amount of Seven Hundred Dollars (\$700.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this Decision shall be served upon the parties.

re: LINSEY E. ECKERT, RONALD T. BOWMAN and GEORGE YOUNG.
P&S Docket No. 6474. Decided February 28, 1985.

Dealer—Insufficient funds check—Failure to pay when due—Failure to pay full price—Suspension of registration—Consent.

Eric Paul, for complainant

John A. Newport, Lake Mills, Wisconsin, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION WITH RESPECT TO LINSEY E. ECKERT

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR § 201.1 *et seq.*). This Decision is entered pursuant to the consent decision pro-

visions of the Rules of Practice applicable to this proceeding (7 CFR § 1.138).

Respondent Eckert admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Decision.

The complainant agrees to the entry of this Decision.

FINDINGS OF FACT

(1) Linsey E. Eckert, doing business as L & H Farms Order Buyers, hereinafter referred to as respondent Eckert, is an individual whose current mailing address is c/o Jack Sewell, Route 2, Lockwood, Missouri 65682.

(2) Respondent Eckert, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce for his own account and for the accounts of others; and

(b) Registered with the Secretary of Agriculture as a dealer to buy livestock in commerce for slaughter.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Respondent Linsey E. Eckert, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

(1) Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented;

(2) Failing to pay, when due, the full purchase price of livestock; and

(3) Failing to pay the full purchase price of livestock.

Respondent Linsey E. Eckert is suspended as a registrant under the Act for a period of four (4) months.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this Decision shall be served upon the parties.

MISCELLANEOUS ORDERS

In re: ROBERT E. STAFFORD and CHARLES RAY STAFFORD. P&S
Docket No. 6381. Order issued January 3, 1985.

Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

The suspension provisions of the Order previously issued in this proceeding are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist provisions shall remain in effect.

In re: ROBERT E. STAFFORD and CHARLES RAY STAFFORD. P&S
Docket No. 6381. Order issued January 14, 1985.

Order issued by Donald A. Campbell, Judicial Officer.

AMENDED STAY ORDER

Paragraph 1 of the cease and desist provisions and the suspension provision of the Order previously issued in this proceeding are hereby stayed pending the outcome of proceedings for judicial review.

The remaining cease and desist provision shall remain in full force and effect.

In re: PALMER G. HULINGS, RONNIE C. AUSTIN, and GEORGE CLINTON McDONNELL. P&S Docket No. 5744. Order issued January 15, 1985.

Order issued by Donald A. Campbell, Judicial Officer.

The Judicial Officer denied a late appeal and refused to grant an extension of time for filing an appeal, since the Judicial Officer lacks jurisdiction to consider an appeal after it has become final.

ORDER DENYING LATE APPEAL

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-

229), in which Administrative Law Judge Victor W. Palmer issued an initial Decision and Order on November 30, 1984. The decision was served on respondent Hulings' attorney on December 7, 1984.

The letter from the Hearing Clerk serving Judge Palmer's decision on respondent Hulings' attorney states:

This Decision will become final without further proceedings 35 days after service hereof unless there is an appeal to the Secretary: *Provided, however*, That no decision shall be final for purposes of judicial review except a final order issued by the Secretary pursuant to an appeal.

In accordance with the applicable rules of practice and procedure, you will have 30 days from the receipt of this notice in which to file with the Hearing Clerk an appeal to the Secretary.

On January 11, 1985, the 35th day after service of the decision on respondent Hulings' attorney, and the day the Decision and Order became final, respondent Hulings' attorney mailed a request for an extension of time within which to file an appeal, and for permission to withdraw as counsel, which was received by the Hearing Clerk on January 14, 1985. Without realizing that the Decision and Order had already become final, the Judicial Officer stamped "Motion Granted" on the request on January 14, 1985. However, since the Decision and Order had already become final, the Judicial Officer lacked jurisdiction to grant an extension of time for filing an appeal.

In a telephone conversation with the Judicial Officer this afternoon, respondent Hulings' attorney stated that he thought that the time for appeal ran from the time when Mr. Hulings received the decision (which time is not shown on the record), rather than from his own service date. However, when respondent Hulings' attorney filed an answer in this proceeding, the Hearing Clerk advised the attorney by letter dated May 1, 1980, as follows:

Your name has been entered on our records as counsel for Respondent Palmer G. Hulings. Hereafter, service of any notices or other papers filed in this proceeding will be made upon you unless instructions to the contrary are received from you, the respondent, or the complainant. A copy of this letter is being sent to respondent Palmer G. Hulings.

No instructions to the contrary were received from respondent Hulings, his attorney, or the complainant. The rules of practice provide for service on the attorney of record or the individual re-

spondent (7 CFR § 1.147(b)). Where an attorney represents a party, only the attorney receives service of documents, which is made by certified mail. The service letter to Mr. Hulings' attorney shows at the bottom: "cc: Mr. Palmer G. Hulings." (Mr. Hulings' copy was sent by regular mail.) Accordingly, the time for appeal ran from the date of service on Mr. Hulings' attorney.

If I had discretion to permit the filing of a late appeal, I would grant respondent's request for an extension of time within which to file an appeal, since this seems to be a case of excusable neglect. However, the rules of practice provide for an appeal to be filed within 30 days after service of the Judge's decision, and further provide that 35 days after the date of service, the initial Decision shall become final and effective. Specifically, the rules provide (7 CFR §§ 1.145(a); 1.142(c)):

§ 1.145 *Appeal to Judicial Officer.*

(a) *Filing of Petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

§ 1.142 *Post-hearing Procedure.*

* * * * *

(c) *Judge's decision.* The Judge, within a reasonable time after the termination of the period allowed for the filing of proposed findings of fact, conclusions and orders, and briefs in support thereof, shall prepare, upon the basis of the record and matters officially noticed, and shall file with the Hearing Clerk, the Judge's decision, a copy of which shall be served by the Hearing Clerk upon each of the parties. Such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145: *Provided, however,* That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

Since I reviewed the various drafts of the Uniform Rules of Practice issued in 1977, and discussed them with the attorneys drafting the rules, I am familiar with the reason for providing that the initial decision does not become final and effective until 5 days after

the 30-day appeal time has elapsed. That was done so that if an appeal was inadvertently filed up to 4 days late, *e.g.*, because of a delay in the mail system, an extension of time could be granted by the Judicial Officer for the filing of a late appeal.

However, it has consistently been held under the Uniform Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after it has become final. *In re Interstate Meat Packing Co.*, 43 Agric. Dec. ____ (Sept. 14, 1984); *In re Toscony Provision Co.*, 43 Agric. Dec. ____ (July 12, 1984), *appeal docketed*, No. 81-1729 (D.N.J. Sept. 10, 1984) (oral argument scheduled Feb. 12, 1985); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. ____ (Nov. 7, 1983) (order denying late appeal); *In re Veg-Pro Distributors*, 42 Agric. Dec. ____ (July 18, 1983) (order denying late appeal); *In re Dick*, 42 Agric. Dec. ____ (June 28, 1983) (order denying motion for relief); *In re Petro*, 42 Agric. Dec. ____ (May 9, 1983); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427, 427-28 (1983) (order dismissing appeal) (appeal filed on same day order became final not timely); *In re Brink*, 41 Agric. Dec. 2146 (1982) (order dismissing appeal), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981); *In re Animal Research Center of Mass., Inc.*, 38 Agric. Dec. 379 (1978) (order denying late appeal); *In re Cook*, 39 Agric. Dec. 116 (1978) (order dismissing appeal).

The Department's construction of its rules of practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. As stated in *Sofarelli Associates, Inc. v. United States*, 716 F.2d 1395, 1396 (Fed. Cir. 1983):

Fed.R.App.P. 4(a)(1) requires, *inter alia*, that when the United States is a party, a notice of appeal must be filed with the trial court within 60 days from the date of entry of the judgment. It is well settled that this requirement is "mandatory and jurisdictional."

There is no rule in the Department's Uniform Rules of Practice providing for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after the initial decision has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Rule 4(a)(5)). The absence of such a rule in the Department's Uniform Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after the initial decision has become final.

Accordingly, respondent's request for an extension of time within which to file an appeal is denied.

It was argued in *Toscony*, *supra*, that since the decision of the Judicial Officer in *In re Utica Packing Co.*, FMIA Docket No. 35, 43 Agric. Dec. ____ (Nov. 18, 1982), was set aside on reconsideration by Assistant Secretary for Administration John J. Franke, Jr., in his capacity as Acting Judicial Officer, jurisdiction existed to set aside the initial Decision and Order by Judge Palmer in *Toscony*. However, in *Utica*, a timely petition to reconsider the decision of the Judicial Officer was filed by complainant within the 10-day period expressly provided for filing such a petition in the Uniform Rules of Practice (7 CFR § 1.146(a)(3)). Since that procedure is expressly authorized by the Uniform Rules of Practice, the procedure followed in *Utica* affords no basis for extending the time for filing an appeal from an Administrative Law Judge's initial Decision after it has become final.

For the foregoing reasons, the following Order should be issued. Since respondent Hulings' attorney no longer wants to represent him in this case, his new attorney should have 20 days after service of this Order on respondent Hulings within which to file a petition to reconsider this Order.

ORDER

Respondent Hulings' attorney's request to withdraw from this proceeding is granted.

The Judicial Officer's January 14, 1985, action stamping "Motion Granted" on respondent Hulings' request for an extension of time for filing an appeal is rescinded.

Respondent Hulings' request for an extension of time for filing an appeal is denied.

A petition to reconsider this Order may be filed within 20 days after service of this Order on respondent Hulings.

This Order shall be served on respondent Hulings by certified mail, with a copy by regular mail to the attorney who previously represented him.

In re. HAROLD KORNBURST. P&S Docket No. 6241. Order issued February 4, 1985.

Order issued by John A. Campbell, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 16, 1984, an Order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of 14 days and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations.

Respondent is now in compliance with the bonding requirements under the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the Order issued October 16, 1984, is terminated. The order shall remain in full force and effect in all other respects.

In re: DANE WALKER and JULIA WALKER. P&S Docket No. 6212. Order issued February 26, 1985.

Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On October 23, 1984, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondents as registrants under the Act for one hundred twenty (120) days and thereafter until they demonstrate that the deficit in their custodial account for shippers' proceeds has been eliminated.

Respondents have sold their auction market and, therefore, are no longer required to maintain a custodial account. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued October 23, 1984, is terminated after the expiration of the 120 day period. The Order shall remain in full force and effect in all other respects.

COURT DECISION

SALVATORE PUPILLO, PETITIONER, *v.* UNITED STATES OF AMERICA, and UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, and JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES. Civil Action No. 84-1666. (PACA Docket No. 2-5958.) Decided February 22, 1985.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPEAL FROM ORDER OF UNITED STATES DEPARTMENT OF AGRICULTURE

Floyd R. Gibson, Senior Circuit Judge.

Petitioner Salvatore Pupillo appeals from the decision of the United States Department of Agriculture ("USDA") to impose a sanction on him under the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499a-499s (1976 & Supp. V 1981) ("PACA" or "the Act"). The sanction, which bars Pupillo from working for a licensee under the Act for at least one year, was based on USDA's finding that Pupillo was "responsibly connected" with the Friedmeyer Produce Co., Inc. ("Friedmeyer"), which itself was found to have violated the Act. Pupillo contends on appeal that the USDA was in error in finding him responsibly connected with Friedmeyer. We reject Pupillo's contention and affirm the imposition of the sanction.

I. Background

Salvatore Pupillo began working as a common laborer for Friedmeyer Fruit and Produce Company, a wholesale produce business, in late 1976, when it was a sole proprietorship of Clarence Friedmeyer's. His brother, Vincent Pupillo, had been working at the company more than a year before Salvatore started work. The company was reorganized in 1978 as Friedmeyer Produce Co., Inc., with Vincent Pupillo as president and treasurer, and Salvatore Pupillo vice-president and secretary. Vincent put up his home as collateral to obtain a loan to purchase Mr. Friedmeyer's interest in the company.

The USDA filed a complaint initiating disciplinary proceedings against Friedmeyer in March 1982. The complaint charged Friedmeyer with violating PACA during the period from September 1979 through May 1981 by accepting consignments of perishable agricultural commodities, selling the products, and failing to account fully and promptly for the sales; and by purchasing perishable agricultural commodities and failing to make full payment promptly of the agreed purchase prices. On December 15, 1982, a USDA Admin-

istrative Law Judge issued a decision and order finding that Friedmeyer had committed willful, repeated, and flagrant violations of section 2 of the Act, 7 U.S.C. § 499b(4).¹

Under PACA, the Secretary of Agriculture has the power to prohibit employment within the perishable agricultural commodities industry of those who are "responsibly connected" with violators of the Act.² "Responsibly connected" is defined as "affiliated or connected with a commission merchant, dealer, or broker as . . . officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association."³ Accordingly, in March 1982, J.J. Gardner, Chief, Regulatory Branch, Fruit and Vegetable Division of the Agricultural Marketing Service (AMS) wrote Pupillo informing him of the disciplinary proceedings against Friedmeyer. The letter stated that because USDA records showed Pupillo to be "an officer, or director, or owner of more than 10%" of Friedmeyer's stock, he was deemed to be responsibly connected with the corporation. Chief Gardner instructed Pupillo to state in writing any basis he might have for contending he was not responsibly connected with Friedmeyer. Pupillo replied by letter that he was "not an officer in Friedmeyer . . . and have not been since July 15, 1980." He further stated that he had informed PACA in July 1980 that he no longer owned stock or was an officer of Friedmeyer. He enclosed minutes from a corporate meeting of July 15, 1980, showing his resignation as vice-president.

In November 1982, Chief Gardner wrote Pupillo again, stating his conclusion that Pupillo had been responsibly connected with Friedmeyer during the relevant period of Friedmeyer's PACA violations. In support of his conclusion Chief Gardner cited the corporate records showing that Pupillo did not resign his office until July 1980, and Friedmeyer's listing of Pupillo as its vice-president, treasurer, and director on its application to renew its license under PACA.

In January 1983 Pupillo petitioned USDA for review of Chief Gardner's determination that he was responsibly connected with Friedmeyer. Pupillo contended that he was not treasurer of Friedmeyer, and that he had only nominally served as director, vice-

¹ 7 U.S.C. § 499b(4) states in part:

"It shall be unlawful in or in connection with any transaction in interstate or foreign commerce for any commission merchant, dealer, or broker * * * to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had * * *"

² 7 U.S.C. § 499h(b).

³ 7 U.S.C. § 499a(9)(B).

president, and secretary, lacking any power or control in the management of the corporation. An evidentiary hearing was held on May 24, 1983 to determine whether Pupillo had been responsibly connected with Friedmeyer during the relevant period. The Presiding Officer, Harry L. Williams, concluded that Pupillo had been responsibly connected with Friedmeyer. The Presiding Officer based his determination on many factors. First, Friedmeyer's 1978 PACA renewal application listed Pupillo as an owner, vice-president, treasurer, and director of the firm.⁴ Second, corporate minutes from May 2, 1978 showed that Pupillo was appointed director of the firm, and was elected vice-president and secretary. The minutes were signed by Pupillo as secretary and director. Next, the corporation's stock book contained a stock certificate for two shares of stock registered in Pupillo's name, dated July 20, 1978, and signed by Pupillo as secretary and his brother Vincent as president. The two shares constituted 50 percent of the outstanding stock of the firm. The stock book notes that the certificate was surrendered July 1, 1980. Vincent Pupillo had written the word "cancelled" on the certificate, but could not recall when he wrote it.

Other evidence supporting the Presiding Officer's conclusion that Salvatore Pupillo was responsibly connected with Friedmeyer included minutes from a Board of Directors meeting, at which the Board approved the corporation's taking out a loan to buy out Mr. Friedmeyer's interest. The minutes were signed by Pupillo as secretary and as a director. Also, a Statement of Change of Registered Agent filed by Friedmeyer with the Missouri State Corporate Division was signed by Pupillo as the firm secretary. A notarized annual registration report filed with the same agency listed Pupillo as vice-president, secretary, and director. The Presiding Officer further noted that Pupillo was in charge of the employees on the night shift, and that the record reflected that Pupillo was fully aware of the corporation's growing financial difficulties.

Pupillo appealed the Presiding Officer's determination that he was responsibly connected with Friedmeyer to the Administrator of AMS. The Administrator affirmed the Presiding Officer's decision in a final order issued on March 27, 1984. Pupillo now appeals to this court.

⁴ The Presiding Officer noted that the listing of Pupillo as treasurer of the firm was probably in error because all of the other documents in evidence listed him as the firm's secretary.

A. Pupillo's Contentions on Appeal

On appeal Pupillo argues, as he did before the Presiding Officer at the AMS hearing, that he was not responsibly connected with Friedmeyer at any time. He attacks the Presiding Officer's finding that he was so connected on two main grounds: first, that his positions as corporate secretary, vice-president, and director were in fact illusory, as was his purported ownership of 50 percent of Friedmeyer's stock; and second, that Friedmeyer was not a proper corporate entity but was rather the alter ego of his brother, Vincent Pupillo.

Pupillo argues that his positions as secretary, vice-president, and director of Friedmeyer were only nominal because he possessed no actual control over the corporation's business. He asserts that the positions were set up by his brother Vincent for the sake of formality, but that no shareholders or Board of Directors meetings were held after April 19, 1978. Instead, Vincent Pupillo would direct his attorney to draw up some minutes, which Salvatore would sign when told to by Vincent, without reading the contents. Vincent Pupillo alone, Salvatore Pupillo alleges, made all of the decisions concerning purchases and payments. The issuance of the two shares of stock to Pupillo, he maintains, was also a sham transaction arranged by Vincent. Pupillo claims that he never paid money, performed services, or exchanged property for the stock as required by the Missouri Constitution. The stock certificate never left the stock record book, and neither the stock transfer sheet nor the stock certificate was signed by Pupillo.

The second argument Pupillo makes as to why he was not responsibly connected with Friedmeyer is closely tied to the first. Because Vincent adopted only the corporate formalities for Friedmeyer, such as making himself and his brother directors and officers, without adopting the manner of corporate functioning, such as directors meetings or votes, Pupillo alleges that the corporation was really the "alter ego" of Vincent. As such, Pupillo contends that Friedmeyer was not really a corporation as contemplated in Section 1(9) of the Act.⁵ Pupillo states that this court should pierce the corporate veil and acknowledge that Friedmeyer was in fact if not in form the sole proprietorship of Vincent Pupillo, so as to avoid working an injustice on Pupillo.

⁵ 7 U.S.C. § 499a(9)(B). See text accompanying note 3.

B. The Law

Few courts have considered the quantum of proof necessary to establish that an individual is "responsibly connected" to a PACA violator. The courts that have addressed the issue are in conflict with each other. In the first case on the question, *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966), the United States Court of Appeals for the Third Circuit interpreted 7 U.S.C. § 499a(9)(B), defining "responsibly connected," as establishing "per se" exclusionary standards. That is, any person affiliated or connected with a PACA violator as an officer, director, or holder of more than 10 percent of the outstanding stock would be subject to the Secretary of Agriculture's power to prohibit employment under 7 U.S.C. § 499h(b),⁶ without being able to establish a defense, such as lack of real authority. Like Pupillo, the appellant in *Birkenfield* was sanctioned under 7 U.S.C. § 499h(b) despite his contention that he was only nominally an officer, director, and shareholder of a PACA violator. The Third Circuit justified its per se approach in part by stating:

Surely, the relationships of director, officer or substantial shareholder form a sufficient nexus for the arbitrary conclusion of responsible connection. Moreover, the formation of such relationships with the sanctioned company is a voluntary act. The fact that an individual has not exercised "real" authority is not controlling; certainly the individual could have resigned as an officer and director and disposed of his stock. It was his free choice not to do so. Having made that choice, the appellant assumed the burdens imposed by the Act.

69 F.2d at 494, 495.

The Second Circuit Court of Appeals, in *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir. 1967), cited with approval the Third Circuit's per se approach in *Birkenfield*.

In contrast to the Third Circuit's approach in *Birkenfield*, the United States Court of Appeals for the District of Columbia held in *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975), that 7 U.S.C. § 499a(9)(B) raises only a rebuttable presumption that one affiliated with a PACA violator as an officer, director, or holder of 10 percent or more of stock is responsibly connected with the violator. The petitioner in that case, who became corporate vice-president only at the request of his employer, and claimed that he never attended

⁶ See text accompanying note 2

board meetings, performed services as vice-president, made any business decisions, or knew of the company's financial difficulties, was given an opportunity to prove his officership was purely nominal. The court concluded that such an opportunity was warranted by looking to the legislative history of 7 U.S.C. § 499a(9). Finding nothing to indicate that Congress intended to establish an irrebuttable presumption of responsible connection, the court declined to interpret the section as stating such a "drastic" standard.

In addition to holding that Section 499a(9)(B) raises a rebuttable presumption, the District of Columbia Circuit also held that the petitioner could avoid the statutory penalty by proving that the company for which he had served as "vice-president" was not a corporation within the meaning of Section 499a(9). The petitioner had offered proof that the company's president and sole shareholder had such complete dominion over the business that it was akin to a sole proprietorship. The court held that the Secretary should have accepted the evidentiary proffer to consider whether the corporate veil should have been pierced so as to render Sections 499a(9) and 499h(b) inapplicable to the petitioner.

The District of Columbia Circuit further strayed from the Third Circuit's per se interpretation of Section 499(9) in *Minotto v. United States Department of Agriculture*, 711 F.2d 406 (D.C. Cir. 1983). The petitioner in that case, Lilly Minotto, was sanctioned pursuant to the Secretary of Agriculture's finding that she was responsibly connected with her employer, which was found to have violated PACA. The finding of responsible connection was based on Minotto's position as a director of the company, and her attendance at Board of Directors meetings, which ensured the quorum necessary to enact resolutions. Minotto, however, denied knowledge of the company's conduct that led to the violations and received no compensation for assuming the director's position. The court reversed the Secretary's finding of responsible connection, stating that "[a] finding of liability under Section 499h of the Act must be premised upon personal fault or the failure to 'counteract or obviate the fault of others.'" 711 F.2d at 408, quoting *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975). The court found significant the lack of evidence in the record that Minotto "knew or should have known of the Company's misdeeds." 711 F.2d at 408.

C. Application of the Law to Petitioner's Case

On appeal, we must uphold the agency decision if it is supported by substantial evidence and no legal errors compromise the decision. See *Glover Livestock Commission Co. v. Hardin*, 454 F.2d 109,

110 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Minotto*, 711 F.2d at 407 n.3. Pupillo urges us to adopt the District of Columbia Circuit's rebuttable presumption analysis of Section 499a(9), or alternatively, to accept that court's holding that piercing the corporate veil can be proper in some PACA cases. We conclude, however, after a review of the cases that the Third Circuit's interpretation of Section 499a(9) as a *per se* rule, conclusively establishing those responsibly connected with PACA violators, is the preferable approach. Reading Section 499a(9) as an irrebuttable statement that an officer, director, or holder of more than 10 percent of the outstanding stock of a corporation or association is responsibly connected with that corporation or association adds objectivity and certainty to the law. The legislative history of Section 499a(9) promotes an interpretation of the section as reflecting Congress' wish to instill certainty into PACA's treatment of individuals responsibly connected with violators. In recommending the bill that amended PACA to include, among other changes, the definition of "responsibly connected," the Committee on Agriculture reported that the bill would "[i]mprove and clarify provisions dealing with the eligibility for license, or for employment by licensees, of persons guilty of specified acts and persons affiliated by them."⁷ The Committee also noted that defining "responsibly connected" would give the term "specific meaning, thus avoiding possible confusion as to interpretations."⁸

Further, the Committee also discussed the section of the bill that changed the section of the Act (now 7 U.S.C. § 499d(b)) dealing with the denial of license applications. Under the bill, an applicant would be refused a license if the applicant (or one of the applicant's officers, directors, or members, or a holder of more than 10 percent of the applicant's stock) was responsibly connected with a person guilty of conduct specified in the section. The Committee pointed out that the license would be refused "without showing (as is now required) that the applicant, officer, director, or member was responsible in whole or in part for such conduct."⁹ Although Section 499d(b) is not at issue in this case, the definition of "responsibly connected" in Section 499a(9) applies throughout the Act. Thus this language evidencing the Committee's intent that a person could be found responsibly connected with a PACA violator without any showing that the person

⁷ H. R. Rep. No. 1546, 87th Cong., 2d Sess. 8 (1962), *reprinted in* 1962 U.S. Code Cong. & Ad. News, 2750.

⁸ *Id.* at 2751.

⁹ *Id.* at 2753.

was in any way responsible for the violation is equally applicable to Section 499h(b), under which Pupillo has been sanctioned. Therefore, a person could be found responsibly connected with a PACA violator and thus denied employment with another licensee under Section 499h(b), regardless of whether that person was responsible for the violation. The District of Columbia Circuit's statement in *Minotto* that a person can be sanctioned under Section 499h of the Act only upon a finding of personal fault or the failure to prevent the fault of others not only reads a condition that does not exist into the Act's definition of responsible connection, it runs afoul of Congressional intent as expressed in the House Report. In sum, we find that a per se analysis of Section 499a(9) better accomplishes Congress' objective of providing a clear definition of "responsibly connected," and that Congress did not intend to require proof of personal fault to penalize a person associated with a PACA violator.

Under the per se interpretation of Section 499a(9), the finding of Pupillo's responsible connection to Friedmeyer is clearly supported by substantial evidence. Indeed, Pupillo as much as concedes that his penalty would be upheld if this court chose to adopt the *Birkenfield* approach. Pupillo passed himself off as Friedmeyer's vice-president, secretary, and director on numerous occasions, most significantly by signing documents filed with the State of Missouri and being designated an officer and director on Friedmeyer's PACA license renewal applications. Further, as the Presiding Officer noted, Pupillo's contention that he was never issued the two shares of stock and that he did not pay for them seems questionable in light of the stock book records indicating that he returned the stock on July 1, 1980. Like the appellant in *Birkenfield*, Pupillo chose of his own accord to assume the positions of director, officer and shareholder of Friedmeyer, and he also chose not to resign the positions until after the corporation had violated PACA. As the Third Circuit stated, "Having made that choice, the appellant assumed the burdens imposed by the Act." 369 F.2d at 495.

Even assuming *arguendo* that Section 499a(9) states a rebuttable presumption, as the District of Columbia Circuit held in *Quinn*, we agree with the Government that the Presiding Officer's finding was well supported by substantial evidence. In *Quinn*, the evidence established that the petitioner had allowed his employer to use his name as vice-president of the company to comply with incorporation requirements, but that he never performed services as vice-president, attended meetings, or had any knowledge of the company's financial problems. In contrast, however, Pupillo signed Friedmeyer's corporate minutes as vice-president and secretary, thereby

approving actions taken by the Board of Directors; signed documents that were filed with the state; signed, as the company's secretary, the stock certificate registered in his name; and formally resigned his positions as shareholder, director, vice-president, and secretary on July 1, 1980. As the Presiding Officer noted, Pupillo's resignation occurred two months after he was informed that he could be penalized if Friedmeyer were found to have violated the Act. And, unlike Minotto, who "had no real authority" within her company, was "essentially a clerical employee," and neither knew or should have known of the Company's violative conduct, Pupillo was, as night boss, second in command at Friedmeyer, and knew of the company's financial difficulties and creditors' demands for payment.

Pupillo contends that no directors or shareholders meetings were held after April 19, 1978, that the minutes were drawn up by an attorney at Vincent's direction, and that Pupillo signed the minutes and other documents when directed to by Vincent, without reading them. Thus Pupillo asserts that he lacked real responsibility or authority. Whether or not Pupillo's contention that he blindly signed the documents and records is true, it is worth noting the Presiding Officer's observation that, "The case rests largely on the accuracy and intent of the records of incorporation, issuance of stock, minutes of director's meetings, and agency licensing records [r]ecords that were prepared long before Friedmeyer incurred substantial problems and the potential issues that might be raised in responsibly connected proceeding." Regardless, we think that Pupillo's retention of his positions for over a two-year period, along with the exercise of his powers in those positions even by merely signing the various documents, thereby enabling Friedmeyer to carry on its corporate business, and his knowledge of Friedmeyer's difficulties, are enough even under the *Quinn* standard to find Pupillo responsibly connected.

Further, we conclude that application of the piercing the corporate veil doctrine is not warranted here. Friedmeyer was, as the Presiding Officer found, duly incorporated under the laws of Missouri. Although Vincent Pupillo may have been the dominant force at Friedmeyer, the company was run with considerable input from Salvatore Pupillo as well. Because Pupillo was properly found to be responsibly connected to Friedmeyer, piercing Friedmeyer's corporate veil would not prevent the working of an injustice on an innocent person, as Pupillo asserts. Rather, it would allow Pupillo to avoid sanction, even though his actions over a two-year period enabled Friedmeyer to do business in the corporate form and enjoy the advantages associated with that form.

D. Evidence at the Hearing

Pupillo also raises for consideration on appeal the inclusion of the "official file" in the evidence at the hearing before the Presiding Officer, without any request or motion from counsel for the USDA that the file be admitted into evidence. Because the file was not formally proffered for admission, Pupillo states that he did not have a chance to object to its admission. He claims that because the Presiding Officer wrongly considered evidence not properly in the record, his substantial rights were affected.

According to the Code of Federal Regulations, when a matter is assigned for an oral hearing, the presiding officer shall make the official file a part of the records of the proceeding.¹⁰ Pupillo was sent a copy of the official file two months before the hearing; further, he does not dispute the contents of the documents in the official file. We agree with the Government that the Presiding Officer's consideration of the official file in this case was at most harmless error. *See County of Del Norte v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984) (general rule is that insubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside).

II. Conclusion

Because we hold that the Presiding Officer's finding that Salvatore Pupillo was responsibly connected with Friedmeyer is supported by substantial evidence, the Decision to sanction Pupillo under 7 U.S.C. § 499h(b) is affirmed.

¹⁰ 7 CFR § 47.53 (1983).

DISCIPLINARY DECISIONS

In re: RICHMOND INSTITUTIONAL FOODS, INC. PACA Docket No. 2-6574. Decided November 28, 1984.

Failure to make full payment promptly—Bankruptcy—Publication of the facts.

Respondent purchased, received and accepted perishable agricultural commodities from 16 sellers but failed to make full payment promptly Respondent presented bankruptcy plan, licensing under the Act was then automatically terminated Facts and circumstances were ordered to be published.

Edward M Silverstein, for complainant.

Leonard O Fletcher, Augusta, Georgia, for respondent

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on June 12, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period September 1982 through February 1983, respondent purchased, received and accepted, in interstate and foreign commerce, from 16 sellers, 73 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$124,434.25.

On August 1, 1984, subsequent to an extension of time, the respondent filed a answer in which it, in effect, admitted all of the material allegations made in the complaint. Respondent further stated that, because the Department of Agriculture did not object to the confirmation of its bankruptcy plan of arrangement, its violations should be excused. Subsequent to the filing of this answer, the complainant moved for a decision based on its assertion that there were no material issues of fact in dispute and that, therefore, as a matter of law, it was entitled to a decision in its favor. Respondent, at first, opposed the granting of this motion, but by letter, dated October 29, 1984, withdrew its opposition. Accordingly, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Richmond Institutional Foods, Inc., is a corporation, whose mailing address is P.O. Box 2105, Augusta, Georgia 30903, and whose business address is 1150 5th Street, Augusta, Georgia 30903.

2. Pursuant to the licensing provisions of the Act, license number 701001 was issued to respondent on January 20, 1970. This license was renewed annually, but automatically terminated on July 1, 1983, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent's plan of arrangement was approved by the United States Bankruptcy Court for the Southern District of Georgia, Augusta Division, Case No. 183-00118.

3. As more fully set forth in paragraph 5 of the complaint, during the period September 1982 through February 1983, respondent purchased, received and accepted in interstate and foreign commerce from 16 sellers, 73 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$124,434.25.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 73 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became effective January 4, 1985.—Ed.]

In re: FARM MARKET SERVICE, INC., a/t/a FMS. PACA Docket No. 2-6511. Decided January 8, 1985.

**Failure to pay promptly—Appeal regarding denial of request for a continuance—
Revocation of license—Publication of the facts.**

The Judicial Officer affirmed Judge Weber's decision revoking respondent's license for failure to pay for produce. Judge Weber did not err in failing to grant a continuance to enable respondent to obtain an attorney since respondent had adequate time within which to obtain an attorney and did not raise the issue until the morning of the hearing. A continuance would not have been in the public interest. A continuance should never be granted to give a respondent additional time in which to pay its obligations in order to convert a case from "no pay," in which a Revocation Order is appropriate, to "slow pay," in which a Suspension Order is appropriate.

Edward M. Silverstein, for complainant.

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge William J. Weber filed an initial Decision and Order on October 29, 1984, revoking respondent's license for failure to pay promptly 28 sellers \$162,903.83 for 71 lots of produce purchased and accepted in interstate commerce during the 15 month period from July 1982 through October 1983. At the time of the hearing, respondent still owed \$99,776.38 of that sum.*

On November 30, 1984, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated

CFR § 2.35).** On December 19, 1984, the case was referred to the Judicial Officer for Decision.

The sole issue raised on appeal is whether Judge Weber erred in denying respondent's request for a continuance of the hearing. Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the Order is changed in view

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app., at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

of the appeal. Additional conclusions by the Judicial Officer follow Judge Weber's conclusions.***

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This proceeding was instituted by a complaint filed on March 26 1984, under the provisions of the Perishable Agricultural Commodities Act, 1930 (7 USC 499a *et seq*; "PACA"), and implementing regulations (7 CFR 46.1-46.45).

The complaint alleges that Respondent violated Section 2 of the PACA (7 USC 499b) when Respondent failed to make prompt payment (7 CFR 46.2(aa)(5)) to 28 vendors for 71 lots of fruits and vegetables in the total of \$162,903.83.

Respondent, by letter, answered the Complaint on April 17 1984 denying any violations of the PACA.

Trial of the issues took place on July 17 1984, in Birmingham, Alabama. An officer of the respondent corporation appeared and requested an adjournment for the purpose of obtaining counsel to represent them. The request was denied. Briefs were filed on behalf of both parties.

* * * * *

PERTINENT STATUTORY PROVISIONS

1. Sec. 2(4).

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

* * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any

***Although I do not agree with Judge Weber's view in subsection b) of his conclusions that a continuance might have been appropriate if respondent had presented the matter differently at the time, I am including his views in full, with my differences indicated in the additional conclusions.

transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

2. Sec. 4(a).

(a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, or is automatically suspended under section 7(d) of this Act, but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: *Provided*, That notice of the necessity of paying the annual fee shall be mailed at least thirty days before the anniversary date: *Provided, further*, That if the annual fee is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 3(b), plus \$5, which shall be deposited in the Perishable Agricultural Commodities Act fund provided for by section 3(b): *And provided further*, That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination;

3. Sec. 8(a).

(a) Whenever (a) the Secretary determines, as provided in Section 6, that any commission merchant, dealer, or broker has violated any of the provisions of Section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated Section 14(b) of this Act, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

PERTINENT REGULATIONS

Sec. 46.2(aa).

"Full payment promptly" is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. "Full payment promptly", for the purpose of determining violations of the [PACA], means:

* * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted.

* * * * *

FINDINGS OF FACT

1. Respondent is an Alabama corporation whose address is 2516 2nd Street West, Birmingham, Alabama 35204.¹

2. Pursuant to the licensing provisions of the PACA, license number 771295 was issued to respondent on May 18, 1977. This license was renewed annually and is next subject to renewal on or before May 18, 1985.²

3. During the period July 1982 through October 1983, respondent purchased, received, and accepted 71 lots of fruits and vegetables, all being perishable agricultural commodities, from 28 sellers in interstate and foreign commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$162,903.83. The details of these transactions are more fully set forth in ¶6 of the complaint.³

4. By notice in writing, dated August 16, 1983, respondent was informed that failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities received and accepted in interstate or foreign commerce are violations of the PACA. Respondent was given the opportunity to demonstrate or achieve compliance with all lawful requirements of the PACA, but failed to do so.⁴

¹ Complaint ¶¶1 and 2. This was not denied by respondent in its Answer.

² Complaint ¶3. The allegation in the complaint was that respondent's license was next renewable on May 18, 1984. According to the Department's records, which are officially noticed, respondent renewed its license.

³ Complaint ¶5; Hearing Transcript ("HT") pages 35-70, 75-77; Complainant's Exhibits ("CX") Nos 4 and 5.

⁴ Complaint ¶5; HT pages 30-33; CX Nos. 1-3. This allegation was not denied in respondent's Answer.

5. The acts of respondent in failing to make full payment promptly of the agreed purchase prices for the 71 lots of produce it purchased, received, and accepted, constitute willful, flagrant and/or repeated violations of Section 2 of the PACA (7 U.S.C. 499b).

CONCLUSIONS

A. Introduction

This is a disciplinary proceeding brought pursuant to section 8 of the PACA (7 USC 499h). The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. 1041, 71st Cong., 2d Sess. (1930)

Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities.⁵ *Chidsey v. Guerin*, 443 F2d 584 (6th Cir. 1971); *O'Day v. George Arakelian Farms, Inc.*, 536 F2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 USC § 499b." *Id.* at 858.

Enforcement is effectuated through a system of licensing, with penalties for violation. H. Rep. 1041, 71st Cong., 2d Sess. (1930) 3. See, also, *George Steinberg and Son, Inc. v. Butz*, 491 F2d 988 (2d Cir.), *cert. den.*, 419 US 830 (1974).

B. Respondent violated the PACA

Section 2(4) of the PACA (7 USC 499b(4)) makes is unlawful, *inter alia*, for any commission merchant, dealer, or broker⁶ to fail to "make full payment promptly" for PACA transactions. Insofar as it is pertinent here, "full payment promptly" is defined by the Department (7 CFR § 46.2(aa)(5)) as requiring payment of the agreed purchase prices for produce within 10 days after the day on which the produce is accepted.

Complainant alleges that the respondent violated the PACA and the regulations by failing to make full and prompt payment of the

⁵ It has also been held that Congress intended by enactment of the PACA, to establish bars to preclude all but financially responsible persons from engaging in the businesses subject to the PACA. *Zwick v. Freeman*, 373 F2d 110, 117 (2d Cir.), *cert. den.*, 389 U.S. 835 (1967); *Marvin Tragash Co. v. United States Dept. of Agri.*, 524 F2d 1255, 1257 (6th Cir. 1975).

⁶ These terms are defined in 7 USC 499a(5), (6) and (7).

agreed purchase prices with respect to 71 transactions involving perishable agricultural commodities, in interstate commerce, for a total of \$162,903.83. While the respondent, in its answer, denied violating the PACA it did not, at the hearing, dispute the fact that it failed to make full payment promptly as required by the PACA and by the regulations issued pursuant to it.

Complainant's evidence includes a computer printout listing respondent's accounts payable (CX No. 4), and copies of the seller's invoices which respondent admitted were due and owing at the time of complainant's investigation (CX No. 5). CX Nos. 4 and 5 fully support the allegations in the complaint as to respondent's failures to make prompt payment.

It is noted that some of the indebtedness which is the subject of the complaint has been paid, albeit late. (See respondent's Exhibit No. 501.) This does not materially alter the fact of Respondent's violations. See, *Baltimore Tomato Company, Inc.*, 39 Agric. Dec. 412 (1980); and *V.P.C., Inc.*, 41 Agric. Dec. 734 (1982).

Respondent's failures to make timely payment, as alleged in the complaint, are clearly in violation of the prohibitions of section 2 of the PACA (7 USC 499b). *Atlantic Produce*, 35 Agric. Dec. 1631 (1976), *aff'd mem.*, 568 F2d 772 (4th Cir.), *cert. den.*, 439 U.S. 819 (1978).

The numerous violations committed by respondent constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States*, 630 F2d 370, 373-374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *G. Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub. nom.*, *George Steinberg and Son, Inc. v. Butz*, *supra*, 491 F2d 988.⁷ These violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, supra*, 32 Agric. Dec. 236, 263-269; *Goodman v. Benson*, 286 F2d 896 (7th Cir. 1961).

Respondent knew or should have known that it could not make prompt payment for the large amount of perishables it ordered, yet

⁷ See, also *Zwick v. Freeman*, 373 F2d 110, 115 (2d Cir.) *cert. den.*, 389 U.S. 835 (1967); *Reese Sales Company v. Hardin*, 458 F2d 183 (1972); *Atlantic Produce, supra*, 35 Agric. Dec. 1631, *J. H. Norman & Son Distributing Co.*, 37 Agric. Dec. 705, 709 (1978):

Respondent's violations are *malum prohibitum*—not *malum in se*. Accordingly, there is no inconsistency between the finding that [respondent] conducted himself responsibly and honorably, and the finding that respondent's failure to pay over \$48,000 for produce in 73 transactions and \$200 in brokerage fees in 20 transactions constitutes repeated, flagrant and willful violations of the Act.

respondent continued to make such purchases. Respondent was aware of the Act's requirements, yet it continued to buy knowing that each purchase probably would result in another violation.

Respondent is required to have sufficient capitalization to operate. It did not and, consequently, could not pay its suppliers. Under these circumstances, respondent operated in careless disregard of the prompt payment requirements of the PACA, and respondent's violations were, therefore, willful. *Atlantic Produce, supra*, 35 Agric. Dec. 1631, 1961; *Rudolph John Kafcsak*, 39 Agric. Dec. 683 (1980), *aff'd mem.*, 673 F2d 1329 (6th Cir. 1981).

C. Sanction

Severe sanctions have been the clearly established policy for sometime. *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1556-1571 (1974). Great weight must be given to the sanctions recommended by the Complainant. *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 845-851 (1972); *In re J. A. Speight*, 33 Agric. Dec. 280, 310-319 (1974); *In re Samuel Esposito*, 38 Agric. Dec. 613, 665 (1979).

Complainant seeks revocation of respondent's license as the proper sanction in this matter. Considering all the pertinent factors involved herein such as the number of respondent's failures to pay and the amounts involved, such a sanction is mandated by the Department's sanction policy. *Gilardi Truck & Transportation, Inc.*, PACA Docket No. 2-6186 (January 27, 1984).

D. Mitigational Aspects

The record should note that respondent's financial difficulties basically arose out of the failure of respondent's customers to pay respondent.⁸ Respondent continued to operate selling to Paul in order to pay Peter and had some measure of success. At the time of trial, respondent had paid about \$63,000.00 of the complaint transactions, cutting the complaint obligations to about \$100,000.00

A respondent witness testified that their operations at the time of trial were on a "current basis" (Transcript page 77), e.g., purchases were then being made on a cash basis or were being promptly paid within the terms of their agreement or the regulations.

Respondent's efforts to satisfy the older unpaid obligations are commendable. But, under the strict interpretation of the PACA, and binding precedents cited, there is no discretion allowed here.

⁸ Respondent lost about \$85,000.00 in one instance of a customer bankruptcy. In addition, Respondent's bank terminated Respondent's line of credit. Respondent says that in less than a year they lost about \$250,000.00 in working capital. (Transcript page 75)

E. Respondent's Contentions of Prejudicial Error

Respondent, by counsel, filed a post-hearing brief claiming violations of due process, the Administrative Procedure Act (5 USC 550 *et seq*) and the rules of practice, because of the denial of respondent's request for an adjournment to obtain an attorney.

Respondent's counsel also contends that respondent did not have sufficient time to prepare for the hearing as scheduled, July 17 1984 in Birmingham, Alabama.

Existing travel and docket commitments almost to the end of the calendar year, and the potentiality that respondent was continuing to violate the prompt payment provisions (as contended by complainant), were considered to be justification for denial of respondent's request for special scheduling⁹ and (at the opening of the hearing) the request to adjourn the hearing to obtain counsel.

Respondent did not seek the services of counsel until very late in the process, just a couple of weeks before the hearing. He now argues that a two month delay in the hearing should have been granted.

Retrospectively, he appears to argue with some merit, but upon the information and circumstances existing at the time respondent's requests were denied, the denials seemed to be fully reasonable and appropriate. If there were not continuing violations accumulating, some delay would have been acceptable, based on a timely well founded request. This was not the situation here.

It is regrettable that respondent failed to perceive the risk here, failed to timely seek counsel and failed to effectively counter argument made by complainant's counsel.¹⁰ (Complainant's Opposition to Respondent's Request to Change Hearing Dates, filed June 20, 1984).

Further, respondent's counsel does not argue that trial in September would have any probability of a different result than trial in July. It seems unlikely. The evidence establishing the violations consists of respondent's own records and admissions.

The key failure on this matter is respondent's.

⁹ Respondent, by letter filed May 29 1984, asked "to have our oral hearing between September 18 and September 21, 1984, anytime after 10:00 AM, at the offices of Farm Market Service, Inc., 2516 Second Street West, Birmingham, Alabama."

This conflicted with other scheduled commitments.

¹⁰ Respondent's argument that it was not in "continuing violation" of the PACA does not have the same impact as the evidence that all *current* transactions were being "promptly" paid, and new or additional violations not accumulating.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent was represented at the administrative hearing by Jimmy W. Brown, an accountant who is respondent's secretary and treasurer, and a director and 1% stockholder of respondent. Mr. Brown had previously filed an answer and represented respondent at all stages of this proceeding until August 31, 1984, when respondent's brief was filed by an attorney, Steven P. McCarron.

On June 7, 1984, respondent received a copy of the Judicial Officer's decision in *In re Gilardi Truck & Transportation, Inc.*, PACA Docket No. 2-6186, decided January 27, 1984, in which the Judicial Officer set forth the Department's new policy that in determining whether an administrative proceeding is a "no pay" case, in which revocation of the license is the appropriate sanction, or a "slow pay" case, in which a suspension order is the appropriate sanction, payments made after the opening of the hearing would not be considered (*Gilardi* slip op. at 42-49). The *Gilardi* decision states that the new policy will not be applied to other cases until the licensee has an opportunity to learn of the new policy, by publication of *Gilardi* in Agriculture Decisions or personal notice of the decision (*Gilardi* slip op. at 44).

Although Mr. Brown filed a number of letters requesting that the hearing be held between September 18 and 21, 1984, he did not indicate until the morning of the hearing that respondent needed a delay in order to obtain legal counsel.

Mr. Brown's first letter filed May 29, 1984, simply requests that the hearing be held between September 18 and 21, 1984, without indicating any reason for the request. His letter states in its entirety:

We would like to have our oral hearing between September 18 and September 21, 1984, anytime after 10:00 AM, at the offices of Farm Market Service, Inc., 2516 Second Street West, Birmingham, Alabama.

On May 31, 1984, Judge Weber set the hearing to begin on July 18, 1984, in Birmingham, Alabama.

On June 6, 1984, complainant's attorney requested that the hearing date be changed to a day before or a day after July 17, 1984, because the July 18, 1984, hearing date conflicted with another case he was handling previously set for July 18, 1984, in Birmingham, Alabama. On June 13, 1984, Judge Weber granted complainant's request and rescheduled the hearing to begin on July 17, 1984.

On June 14, 1984, before Mr. Brown received Judge Weber's notice rescheduling the hearing to July 17, 1984, he wrote a letter filed June 18, 1984, stating in its entirety:

Our letter of May 23, 1984, requested a hearing date of between September 18, 1984, and September 21, 1984, at the offices of Farm Market Service, Inc., in Birmingham, Alabama.

Your transmittal letter of June 7, 1984 [forwarding a copy of complainant's request for a change in the July 18, 1984, hearing date], sets a date of either July 17, 1984, or July 19, 1984, for the hearing in Birmingham, Alabama.

We are requesting that our original date of between September 18, 1984, and September 21, 1984, be acknowledged so that all principals involved may attend the hearing and that we may have ample time to prepare our defense. The July dates are not feasible for us.

Complainant filed an objection to respondent's request on June 20, 1984, stating:

In this disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the hearing has been set for July 17, 1984, in Birmingham, Alabama. Respondent now moves for a postponement of that date until sometime during the week of September 17, 1984. Complainant respectfully opposes such a two month delay in the holding of this hearing. In support thereof, on information and belief, complainant says that respondent is continuing to operate in willful, repeated and flagrant violation of the Act, and that, because of respondent's manner of doing business in violation of the Act, its continued ability to operate is a threat to the perishable commodities industry. Respondent's request, therefore, ought to be denied.

Judge Weber then filed an order on June 25, 1984, denying respondent's request for the following reasons:

Respondent has requested that the hearing be held between September 18 and September 21, 1984, anytime after 10:00 a.m. at their offices in Birmingham, Alabama.

At the time this matter was assigned for trial (May 31 1984) my docket was already fully scheduled into mid Oc-

tober and a backlog of cases that had been tried were awaiting review and the writing of a decision.

In particular, other matters are already scheduled for the last half of September which prohibit favorable consideration of Respondent's request.

After considering all of the aspects, it was considered appropriate to squeeze this matter into mid July rather than wait until mid fall.

That raised a conflict of schedule with another case, which was then reassigned to me for trial in the same week in Birmingham, Alabama.

Prior commitments prevent granting Respondent's request for a hearing between September 18 and 21 1984, the public interests favors early resolution of this dispute, the Complainant objects to rescheduling the matter in September and avers that Respondent is continuing to operate in violation of the law, and economical use of time and resources strongly suggest trying this case in conjunction with the second trial scheduled in Alabama for that week.

IT SHOULD BE AND HEREBY IS ORDERED that the request to reschedule the hearing in September 1984 is denied.

The hearing will begin at 9:30 a.m. on Tuesday July 17 1984 in the United States Court House, 1800 Fifth Avenue, North, Birmingham, Alabama 35203.

Before Mr. Brown received Judge Weber's order of June 25, 1984, denying his request, Mr. Brown wrote a letter dated June 26, 1984, which was filed on June 29, 1984, again requesting a mid-September hearing. Mr. Brown's letter states in its entirety:

Thank you for sending a copy of Complainant's Opposition to our Request for Change of Hearing Date. Complainant is wrong in his reply that we are continuing to operate in willful, repeated and flagrant violation of the act and his ascertainment that our manner of doing business and our ability to operate threatens the perishable commodities industry is unfounded, untrue and unwarranted. The complainant has an obligation to uphold the law but he also has an obligation to be fair and evenhanded. I trust the old statement of being innocent until proven guilty still stands in our dealings with the courts.

We continue to plead for a Mid-September hearing.

On July 12, 1984, Judge Weber sent a final letter to Mr. Brown advising him that the hearing would be held on July 17, 1984.

At no time prior to the opening of the hearing on July 17, 1984, did Mr. Brown indicate that respondent wished to be represented by an attorney or that the July 17, 1984, hearing date conflicted with the schedule of any attorney. Respondent had ample opportunity to obtain the services of an attorney and to prepare for the hearing by July 17, 1984. Complainant's investigator advised Mr. Brown and another of respondent's officers in October of 1983 that it was very likely that a formal disciplinary action would be initiated against respondent, which could result in a suspension or revocation order (Tr. 57-59). Furthermore, the complaint was filed on March 26, 1984, and received by respondent on March 30, 1984. Respondent did not contact an attorney until over 3 months after it received the complaint, *viz.*, in the first part of July 1984 (Tr. 6-9), which was only 2 or 2½ weeks before the hearing.

Since respondent made no effort to contact an attorney until about 2 or 2½ weeks before the scheduled hearing date, and did not advise Judge Weber until the beginning of the hearing that the attorney selected by respondent had just returned from a 2-week's vacation and could not represent respondent on that date, it was not an abuse of discretion for Judge Weber to refuse to grant a continuance.

If respondent had contacted the attorney selected promptly after the complaint was filed, it is quite possible that he could have prepared for the hearing and represented respondent on July 17, 1984. Or perhaps he could have rescheduled his vacation a few days earlier or later. Or perhaps the two Birmingham cases could have been reset to accommodate respondent's counsel. But since respondent neglected to contact an attorney until just 2 or 2½ weeks before the hearing, and respondent did not advise Judge Weber of any difficulty in obtaining an attorney until the morning of the hearing (after Judge Weber and the Department's attorney had traveled to Birmingham prepared to participate in two PACA cases on successive days), it was not an abuse of discretion for Judge Weber to refuse to grant a continuance.

Furthermore, it is manifest that a continuance could not have enabled respondent to disprove the violations in this case. Mr. Brown, who is an accountant and respondent's secretary and treasurer, was thoroughly familiar with the transactions involved in this proceeding. Mr. Brown admitted at the hearing that he was not disputing any of the findings of complainant's investigator (Tr. 86). In fact, Mr. Brown introduced an exhibit showing that as of

July 13, 1984, respondent still owed \$99,776.38 of the amount alleged in the complaint (RX 501).

Judge Weber points out that respondent's current transactions were being "promptly" paid, and that additional violations were not accumulating. However, most of the serious past violations alleged in the complaint were continuing as of the time of the hearing. Only 9 of the 28 shippers involved in the complaint were paid in full as of the time of the hearing (RX 501). Many of the sellers involved in the complaint had been owed large sums of money by respondent for about 2 years as of the time of the hearing. Hence at the time of the hearing, many of the serious payment violations, involving approximately \$100,000, were continuing. Under these circumstances, a 2-month continuance would not have been in the public interest. To achieve the Congressional purpose of this remedial statute, cases involving serious violations should be promptly completed.

Mr. Brown explained at the hearing the adverse circumstances affecting respondent which prevented respondent from paying its obligations. Respondent had bad debts and worthless checks totaling \$59,126. In addition, respondent lost \$85,000 from trucking losses and its inability to collect a judgment. Furthermore, on March 12, 1982, respondent's line of credit of \$103,723 was withdrawn by its bank, and the bank was fully paid by respondent on June 17, 1982. These circumstances amounted to a total reduction of operating capital of \$247,849. However, it has repeatedly been held that all such excuses are irrelevant in proceedings under the Perishable Agricultural Commodities Act (see *Gilardi* slip op. at 16-32).

The only help that an attorney might have been able to give respondent that is suggested in respondent's brief is that an attorney would have advised respondent, based on the *Gilardi* decision, that any outstanding debts should be paid at once to reduce the sanction. However, respondent received the *Gilardi* decision on June 7, 1984, and even a layman could readily understand from that decision that any outstanding debts should be paid prior to the hearing to reduce the sanction. Mr. Brown's testimony at the hearing made it clear that respondent was doing all that it could to pay its obligations, and there is no reason to believe that respondent could have obtained the additional \$100,000 needed to pay the debts outstanding as of the time of the hearing. Respondent's bank had already withdrawn its support from respondent.

In addition, respondent was advised in writing by the Chief of the Regulatory Branch on August 16, 1983, that respondent's failure to make full payment promptly of the agreed purchase prices

for perishable agricultural commodities could be sufficient grounds for revoking or suspending respondent's license (CX 1). And respondent was further advised in writing on September 8, 1983, by the Chief of the Regulatory Branch that a representative of the Department would be visiting respondent to determine if its payment practices were in compliance with the Act, and that failure to make full payment promptly could result in the revocation or suspension of its license (CX 3). The letter advised respondent to "take immediate steps to pay all past-due produce accounts, while continuing to meet your current obligations for payment of fruits and vegetables" (CX 3).

Since respondent was advised over 10 months prior to the hearing to take immediate steps to pay all past due accounts, and respondent received a copy of the *Gilardi* decision almost 6 weeks prior to the hearing, indicating the desirability of making full payment prior to the hearing, there is no basis for believing that respondent could have made full payment by the time of the hearing even if a 2-month continuance had been granted. (Respondent's counsel does not even assert in its appeal brief that full payment has been made as of this date, but, in any event, payments made after the hearing would not be considered in determining the sanction.)

Even if respondent could have made full payment by mid-September 1984, a continuance should never be granted merely to give a respondent additional time to pay its obligations. Due to the delays involved in conducting investigations, getting the complaint filed and getting a hearing date, obligations will generally be due for more than a year prior to the hearing date. Further delay to give a respondent additional time for paying its obligations would expose other shippers to jeopardy and would not serve the public interest.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent's license is revoked.

The facts and circumstances as set forth herein shall be published.

This Order shall take effect on the 30th day after service thereof on the respondent.

[This Decision and Order became effective January 4, 1985.—Ed.]

In re: GREATER MCCOY'S MARKETS, INC. PACA Docket No. 6396. Decided January 15, 1985.

Failure to make full promptly—Revocation of license—Consent.

Respondent purchased, received, and accepted perishable agricultural commodities from 28 sellers but failed to make full payment promptly. Respondent's license was revoked.

Edward M. Silverstein, for complainant

Robert M. Heller, Los Angeles, California, for respondent

Decision by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred to as the "Act"), instituted by a complaint filed on September 13, 1983, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period May 1982 through August 1982, Respondent failed to make full payment promptly to 28 sellers, of the agreed purchase prices, or balances thereof, in the total amount of \$208,838.18 for 203 lots of perishable agricultural commodities, purchased, received, and accepted in interstate and foreign commerce. A copy of the complaint was served upon Respondent. Respondent filed an Answer denying the allegations in the complaint. However, Respondent has now filed an amended answer consenting to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Greater McCoy's Markets, Inc., (hereinafter "Respondent"), is a California corporation, whose business address is 2038 E. 10th Street, Long Beach, California 90804.

2. Pursuant to the licensing provisions of the Act, license number 136608 was issued to Respondent on October 29, 1963. This license was renewed annually, and is next subject to renewal on or before October 29, 1984.

3. The Secretary has jurisdiction over respondent and the subject matter involved herein.

4. As detailed in paragraph 5 of the Complaint and as admitted by Respondent, during the period May 12, 1982 through August 2,

1982, Respondent, failed to make full payment promptly to 28 sellers of the agreed purchase prices or balances thereof, in the total amount of \$208,838.18 for 203 lots of perishable agricultural commodities, purchased, received, and accepted in interstate and foreign commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 4 above, for which the Order below is issued.

ORDER

Respondent's license is revoked.

This order shall become effective on January 24, 1985.

Copies hereof shall be served upon the parties.

In re: CUSUMANO BROS. CO., INC. PACA Docket No. 6640. Decided December 3, 1984.

Failure to make full promptly—Revocation of license.

Respondent purchased, received, and accepted perishable agricultural commodities from 33 sellers but failed to make full payment promptly Respondent's license was revoked.

Edward M. Silverstein, for complainant.

Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 13, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1982 through January 1984, respondent purchased, received and accepted, in interstate and foreign commerce, from 33 sellers, 111 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$273,801.26.

A copy of the complaint was served upon respondent on which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Cusumano Bros. Co., Inc., is a corporation, whose address is 10570 Gratiot Avenue, Detroit, Michigan 48213.

2 Pursuant to the licensing provisions of the Act, license number 720005 was issued to respondent on July 2, 1971, was renewed annually, presently is in effect, and is next subject to renewal on or before July 2, 1985.

3. As more fully set forth in paragraph 5 of the complaint, during the period December 1982 through January 1984 respondent purchased, received and accepted, in interstate and foreign commerce, from 33 sellers, 111 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$273,801.26.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 111 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

[This decision and order became final January 15, 1985.—Ed.]

In re: KAPLAN'S FRUIT & PRODUCE COMPANY, INC. PACA Docket No. 2-6059. Decided January 30, 1985.

Dealer—Appeal and cross-appeal—Failure to account truly and correctly—Failure to make full payment promptly—Consignment—Suspension of license—Publication of the facts.

The Judicial Officer substantially modified Chief Judge Campbell's decision suspending respondent's license for 10 days insofar as it involves buying as a dealer and for 45 days in a fiduciary capacity. The Judicial Officer suspended respondent's license for 30 days in all capacities. Since respondent handled consignment transactions but did not record on the sales tickets the lot numbers as required, complainant determined the amount due consignors by taking an average of all sales of produce that was on hand at the time. Although this method tends to overstate the amount of underpayments, it is approved for the purposes of this case, but, where practicable, complainant should use judgment as to which sales to include in estimating the amounts owed to consignors. If a licensee had records other than the ones required to be kept by the Act that substantiated its accountings to consignors, they would be given substantial weight only if determined to be genuine, contemporaneous records of the actual sales prices. A license may be suspended if violations are willful or if prior notice has been given. Here we have both. Once a warning letter has been sent, no subsequent warning letters are required as to similar violations. Severe sanction policy explained. Violations of fiduciary duty are extremely serious, as well as recordkeeping violations. In determining sanction, the facts that violations relate only to a trivial part of the total business, and that respondent's business is unusually large, are considered. An additional suspension order applicable only to fiduciary transactions, as was issued in *In re Sol Salins, Inc.*, will no longer be issued, in view of the administrative burdens of policing such sanctions.

Edward M. Silverstein, for complainant.

W. L. Zeltonoga, Los Angeles, California, for respondent.

John A. Campbell, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Chief Administrative Law Judge John A. Campbell (ALJ) filed an initial decision and order on October 25, 1984, suspending respondent's license for 45 days insofar as it involves respondent's handling of produce in a fiduciary capacity, and for 10 days insofar as it involves respondent's buying or selling of produce as a dealer.¹

On November 21, 1984, complainant, seeking a 45-day suspension as to all licensing activities, appealed to the Judicial Officer, to

¹ See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1984 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980 and May 1982 Supp.).

whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).²

On December 12, 1984, respondent filed a cross-appeal, which is permitted by the Department's Rules of Practice. 7 CFR § 1.145(b); *In re Thornton*, 41 Agric. Dec. 870, 900-02 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983). The case was referred to the Judicial Officer for decision on January 14, 1985.

Oral argument before the Judicial Officer, which is discretionary (7 CFR § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based on a careful reading of the entire record in this case, the initial decision by the ALJ is adopted as the final decision in this case (with a few minor changes), except that the sanction is changed to a 30-day suspension of all respondent's licensed activities. The ALJ's views as to the sanction are included herein, with the Judicial Officer's views set forth in additional conclusions following the ALJ's conclusions.

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

PRELIMINARY STATEMENT

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter the "Act" or "PACA"), the Regulations promulgated pursuant to the PACA (7 CFR 46.1 through 46.45; hereinafter the "Regulations"), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 CFR 1.130 through 1.151; hereinafter the "Rules of Practice"). The proceeding was instituted by a complaint filed on July 12, 1982, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that Kaplan's Fruit & Produce Co., Inc., hereinafter "Kaplan's" or "respondent"), violated section 2 of the

² The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 219 (1953), reprinted in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Act (7 U.S.C. 499b) by failing to account truly and correctly and by failing to make full payment promptly of the net proceeds to three consignors for 15 lots of fruits and vegetables, all being perishable agricultural commodities, in the total amount of \$9,410.28. Respondent filed an answer, on August 31, 1982, in which it denied violating the Act.

An oral hearing was held on March 2 and 3, 1983, before Administrative Law Judge John G. Liebert, in Los Angeles, California. Complainant was represented by Edward M. Silverstein, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D. C. 20250. Respondent was represented by William Zeltonoga, Esq., One Century Plaza, 2029 Century Park East, Suite 2970, Los Angeles, California 90067, and Batiste De Luca, Esq., Suite 722, 1825 K Street, N.W., Washington, D. C. 20006. At the close of the hearing, the time was fixed for the filing of briefs.

On August 13, 1984, this proceeding was reassigned to me pursuant to section 1.144(d) of the Rules of Practice (7 CFR § 1.144(d)). The parties were given 15 days to file comments and/or objections to this procedure. None were filed.

Five witnesses testified at the hearing and eight exhibits were offered and seven received in evidence. The hearing record does not clearly reflect that Exhibit No. 4 was admitted into evidence. Exhibit #4 was offered. There was extensive examination (Tr. 62-80, 209-212) concerning its contents. The contents of the exhibit are relevant and material, and so Exhibit #4 is hereby received in evidence.

FINDINGS OF FACT

1. Respondent is a California corporation whose address is 762 Market Court, Los Angeles, California 90021.

2. Pursuant to the licensing provisions of the PACA, license number 179565 was issued to respondent on January 14, 1959. This license was renewed annually and was next subject to renewal on or before January 14, 1984.

3. By notice in writing, dated February 13, 1975, respondent was notified that a review of its records had disclosed it was failing to account truly and correctly for fruits and vegetables received and accepted on consignment in interstate and foreign commerce. It was also informed that failure to account truly and correctly for perishable agricultural commodities received and accepted on consignment in interstate or foreign commerce is a violation of the PACA. Respondent was warned of the consequences which could follow if it committed additional violations.

4. On or about September 28, 1981, the Department received a complaint from Alpha Distributing, P. O. Box 2197, Nogales, Arizona 85621, alleging that respondent had not truly and correctly accounted for 2 lots of tomatoes it had accepted on consignment from Alpha Distributing. In response thereto, the Department sent two representatives, Mr. Thomas Leming and Ms. Michiko Fukunaga, to respondent's place of business to review its records regarding those shipments. This personal investigation took place on November 5, 6, and 9, 1981. During the course of the investigation, the Department personnel thoroughly reviewed respondent's records with regard to the sales of these tomatoes. The lots of tomatoes were assigned lot numbers 8742 and 8758 in respondent's receiving record. Although that record also showed the tomatoes as having been purchased, a discussion with Mr. Milton Kaplan, respondent's president and operating officer, and Mr. Ron Reis, of Fiesta Sales, Nogales, Arizona, who was the broker on the two transactions, confirmed that the two transactions were consignments. Because respondent's accounts of sales for the two transactions were not detailed and accurate in that they only reported gross sales figures for each lot, the Department's investigators reviewed all of respondent's sales tickets for the period April 21-April 25, 1981, which they determined as the period when sales of these two lots of tomatoes would have to have taken place. The great majority of the sales tickets did not include lot numbers, although some did show brand names. By eliminating all sales which could be identified as not being part of either of the two subject lots, and by combining the two lots, since there was no way of distinguishing between sales of the two, the investigators prepared an accounting which reflected that respondent underpaid Alpha Distributing \$4,968.93.

A detailed comparison of respondent's accounts of sale with that of complainant's investigators appears at page 9 of complainant's brief and in Exhibits 2, 3, and 4.

After being advised of the results of the Department's audit, respondent negotiated a settlement with Alpha Distributing, and paid Alpha \$1,054.75.

5. Because of respondent's past record regarding consignment sales, and the results of the Alpha audit, Mr. Leming and Ms. Fukunaga returned to respondent's place of business, on December 7 through December 11, 1981, in order to review all of respondent's consignment sales, subject to the PACA, for the previous two years. In addition to the two Alpha Distributing transactions, respondent's records revealed 13 other consignment transactions which were subject to the PACA during this period of time, one with

Pandol Bros., Inc., Delano, California, involving Chilean grapes, and twelve with Quechan Environmental Farms, Yuma, Arizona, involving hothouse tomatoes. Respondent's records reflected numerous other consignment transactions, which involved only intrastate commerce and were not subject to the PACA.

6. During the period December 31, 1979, through January 8, 1980, respondent accepted 6 lots of hothouse tomatoes from Quechan Environmental Farms, Yuma, Arizona, which were assigned lot numbers 7641, 7642, 7663, 7664, 7734, and 7769, with a total of 1,020 cartons. Although respondent sent accounts of sale to Quechan Environmental Farms for each of the six consignment transactions, its records did not support those accounts of sale. A review of respondent's sales tickets established that 1,145 cartons of tomatoes, which may have been part of these lots, were sold during the period of time when the subject tomatoes were in respondent's place of business. These cartons of tomatoes were either specifically identified as belonging to one of the aforementioned lot numbers, or were not identified as being related to another shipper or another lot. Since these sales could not be sufficiently identified as belonging to any individual lot of the six lots consigned to respondent by Quechan Environmental Farms, the Department's investigators compiled all of the sales into one accounting, and deducted 125 cartons at the average sales price to reduce the 1,145 total found as being sold to the 1,020 cartons actually received.

A detailed comparison of respondent's accounts of sale with that of complainant's investigators appears at pages 11 through 14 of complainant's brief and in Exhibits 3 and 4.

In connection with the compilation of six consignments, respondent overpaid Quechan \$372.36.

7. During the period January 21 through January 31, 1980, respondent accepted six more loads of hothouse tomatoes on consignment from Quechan Environmental Farms, Yuma, Arizona, which were assigned lot numbers 7991, 8060, 8061, 8135, 8136, and 8176, with a total of 1,432 cartons. Although respondent sent accounts of sale to Quechan Environmental Farms for each of these six lots of hothouse tomatoes, its records did not support the accounts of sale. Through a review of respondent's sales tickets for the period of time when these tomatoes were most likely in respondent's place of business, the Department's investigators established that respondent's records only reflected sales of 1,014 cartons as being sufficiently identified with any of these six lots, by having a proper lot number on the sales ticket, or by lack of identification with another shipper or lot number. In view of this inability to establish the lot to which each sale applied, the Department's personnel

compiled all of the sales into one accounting. Since they could only identify 1,014 cartons as having been sold, and respondent's records did not reflect any other disposition, 418 cartons were added to the 1,014 identified, in order to account for the 1,432 cartons respondent received. The average selling price of the added 418 cartons was \$6.3348, which was the average selling price of the 1,014 cartons reported as sold by respondent.

As a result, it was found that respondent underpaid Quechan Environmental Farms \$657.09 for the second six consignment transactions.

A detailed comparison of respondent's accounts of sale with that of complainant's investigators appears at pages 15 through 17 of complainant's brief and in Exhibits 3 and 4.

8. On or about April 9, 1981, respondent received and accepted on consignment 1,669 lugs of Fruitera Brand Chilean grapes from Pandol Bros., Inc., and assigned them lot number 8549. Although respondent submitted an account of sales to Pandol Bros., its records did not support this accounting.

The investigators' review of respondent's records established that those records showed sales of 2,474 lugs of grapes which may have consisted in part of the 1,669 lugs under consignment lot number 3549. The reason why the audit showed 805 more cartons as being sold than were accepted is because respondent's sales tickets failed properly to identify the lot number for sales of grapes during the period of time when these grapes were in respondent's place of business. In order to reduce the 2,474 lugs found, to the 1,669 received in this lot, 805 lugs were deducted at the average selling price of \$11.0402 per lug. The Department's audit reflects that respondent underpaid Pandol Bros. \$4,157.62 on this transaction.

A detailed comparison of respondent's account of sales with that prepared by complainant's investigator appears at page 18 of complainant's brief and in Exhibits 3 and 4.

9. During the period December 1979 through December 1981, respondent, as noted above, acting as a commission merchant for ree consignors, sold 15 lots of fruits and vegetables, in interstate and foreign commerce, collected the proceeds therefrom, but failed to account truly and correctly, and failed to make full payment promptly of the net proceeds to three consignors in the amount of \$4,410.28, computed on the basis of average sales prices.

10. Respondent has since made payment to these three consignors of the amounts due with respect to the transactions mentioned in finding 9.

11. Respondent's gross sales totaled \$28,000,000 in fiscal year 1982. About one-third of this volume of business, or \$8,000,000, was

in interstate commerce. Respondent testified that 99% of its total business is dealer/purchase transactions.

In the course of the audits, complainant reviewed about 2,000 consignment transactions, which occurred over a two year period. Of the 2,000 transactions, 15 were identified as consignment transactions in interstate commerce; all 15 of which, insofar as records and prompt payment were involved, were in violation of the Act.

As noted in findings 4, 6, 7, 8 and 9, the underpayment's involved in the 15 consignment transactions, computed on the basis of average sales prices, amounted to \$9,410.28, which in turn amounts to less than 1% of respondent's interstate transactions. E.g., \$9,500 ÷ \$8,000,000. (Tr. 58-59, 83-84, 97, 116-117, 165, 220-222, 303-305, 320-322)

CONCLUSIONS

All contentions of the parties raised at the hearing and in the briefs have been considered in the light of the entire record in arriving at this decision and order.

Based upon the record evidence in this proceeding, it is concluded that the acts of respondent in failing to account truly and correctly, and failing to make full payment promptly of the net proceeds due the three consignors, constitute willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b).

Under Section 2(4) of the Act (7 U.S.C. 499b(4)) it is unlawful for any commission merchant, dealer, or broker to fail or refuse truly and correctly to account and to make full payment promptly in respect of any transactions involving perishable agricultural commodities in interstate commerce. Insofar as is pertinent here, "full payment promptly" is defined by the Department (7 CFR § 46.2(aa)(1)) as requiring payment of the net proceeds for produce received on consignment within 10 days after the day on which the final sale with respect to each shipment is made. The Department's Regulations define "Truly and correctly to account" as, essentially, requiring an accurate statement of sales or other disposition of produce and the selling charges and expenses. (7 CFR § 46.2(y)). The Regulations require that such accounts of sale must be rendered within 10 days after the date of the final sale. (7 CFR § 46.2(z)(2)).

Complainant alleged that the respondent violated the PACA and the Regulations by failing to account truly and correctly and by failing to make full and prompt payment of the net proceeds with respect to 15 transactions involving tomatoes or grapes, each being a perishable agricultural commodity, in interstate commerce, for a total of \$9,410.28, computed on the basis of average sales prices.

The evidence presented at the hearing clearly supports complainant's allegations. Mr. Thomas Leming, the Department's investigator, testified as to the methodology he and Ms. Michiko Fukunaga used in conducting their investigation. He testified that he requested access to respondent's receiving records from respondent's president, where information concerning each lot received is supposed to be recorded, and access to respondent's actual sales tickets (or sales invoices) for the produce in question. Further, he testified that he also reviewed respondent's accounts' receivable records, bank statements, and the lot sheets which respondent is required to maintain. When they received access to the respondent's records, Mr. Leming and Ms. Fukunaga compared the records to the accounts of sale respondent had sent to each of the consignors.

After it was discovered that the respondent's records did not support the accounts of sale which respondent had sent the consignors, the Department's auditors conducted a review of respondent's records. By looking at every sales ticket for the appropriate commodity during the period of time when each of the consigned lots was most likely in respondent's warehouse, the Department's investigators identified every sale which may have represented a sale of the consigned commodity. Each such sale was recorded. Any sale which was identified as a sale from a lot which was not part of the consignment transactions was eliminated.

As to the transactions involving Quechan Environmental Sales, the investigators arranged them in two groups of six each because, while individual sales could not be related to individual lots, they could be identified as to one of two time frames. For the same reason, sales of the two lots of tomatoes on consignment from Alpha Distributing were compiled into one account of sale. The auditors then computed an average sales price for all sales made during the audit period, those which were identified by the lot number assigned to the consignment transaction and those which were not otherwise identified. The total number of units found for the audit period was divided into the total price of all such units to derive an average sales price for each such unit. If the total number of units sold exceed the total number of units in the consignment, the auditors deducted the excess number of units at the average sales price. This gave the consignment a gross sales price equal to the number of units in the consignment multiplied by the complainant's average sales price of all sales during the audit period.

If the total number of units sold was fewer than the number in the consignment, the auditors added the difference between the units recorded and the units in the consignment at the average

sales price. This, too, produced a gross sales price for the entire consignment equal to the number of units in the consignment times the average sales price for all sales during the period.

In short, the entire consignment was priced at the average sales price. The auditors then deducted commission and expenses from the gross sales price to arrive at a net proceeds figure due the consignor. This methodology was approved in *Sol Salins*, 37 A.D. 1699 (1978).

From their review, Mr. Leming and Ms. Fukunaga determined that the respondent had failed to account truly and correctly to the consignors named in the complaint because its records failed to support the accountings it submitted to these consignors. These 15 transactions represented every consignment transaction subject to the PACA in which respondent participated over the previous two-year period. Moreover, the Department's investigators, through the tedious review of respondent's records were able to construct accounts of sale which were reflective of respondent's records. These audit accounts of sale established that respondent underpaid the three consignors a total of \$9,410.28, based on average sales prices.

In response to the evidence adduced by complainant in support of its allegations in the complaint, respondent presented the testimony of Messrs. Bob Hashimoto and Milton Kaplan. Mr. Hashimoto, respondent's office manager, testified that respondent's records, although not the ones which were shown to Mr. Leming, were correct and supported its accountings to the consignors. However, the records which Mr. Leming reviewed were those which the Regulations require respondent to keep in an accurate manner, and respondent did not offer any of its "correct" records to the investigator, or into evidence at the hearing.

Mr. Kaplan's testimony was that the Department's audit results were incorrect based on the condition of the produce received. However, Mr. Kaplan also testified that he did not challenge the results of the Department's audit at his post-audit meeting with Mr. Leming and Ms. Fukunaga, nor did he attempt to show them why their results were incorrect. Further he did not review his company's records to see whether the audit was accurate.

Respondent argues that its violations cannot be determined to be willful because the Department did not send a warning letter regarding the particular violations at issue here, and allow it an opportunity to rectify these particular violations prior to the time that suspension of its PACA license was sought. Respondent however overlooks the February 13, 1975, warning letter it received. That letter specifically concerns respondent's failure to account truly and correctly for produce handled on consignment in 1973, and is

sufficient to warrant a finding of willfulness as to subsequent violations. Respondent's argument that it is entitled to receive a warning letter as to each violation, that it is entitled to an opportunity to correct that violation, and that an action cannot be taken against its license until it fails to correct that violation, is without merit.

Respondent also argues that the violations are *de minimis* infractions since the total amount of concerned monies is \$9,410.28, or .11% of respondent's interstate business.

However, the type of violation committed by respondent is one of the more serious under the Act because respondent violated a fiduciary duty it owed to its principals. Respondent violated this duty on each and every interstate consignment transaction in which it participated over a two-year period.

In summary, it is concluded that respondent failed to truly and correctly account to these three consignors. Since respondent underpaid the consignors, it must also be concluded that respondent failed to make timely payment to them. It is noted too that respondent did, after the Department's investigation, pay the three shippers involved the amounts due them. However, this does not materially alter the fact of its violations.

Respondent's failures to account truly and correctly and make timely payments, as alleged in the complaint, are clearly in violation of the prohibitions of section 2 of the PACA (7 U.S.C. 499b). *Atlantic Produce*, 35 A.D. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. den.*, 439 U.S. 819 (1978). Moreover, the numerous violations committed by respondent constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980) *cert. denied*, 450 U.S. 997 (1981); *G. Steinburg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub. nom.*, *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) *cert. denied*, 419 U.S. 830 (1974). Furthermore, these violations were willful. A violation is willful, if irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or carelessly disregards the requirements of a statute. *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961).

Respondent had been warned in the past that its methodology for handling consignment transactions violated the PACA. Although having received instruction on the proper methodology for maintaining consignment sales records, respondent continued its violative practices. Under these circumstances, respondent clearly operated in careless disregard of the requirements of the PACA, and respondent's violations were, therefore, willful. *Atlantic Produce*,

supra, 35 A.D. 1631, 1961; *Rudolph John Kafcsak*, 39 A.D. 683 (1980), *aff'd. mem.*, 673 F.2d 1329 (6th Cir. 1981).

SANCTION

For its violations, complainant seeks a 45-day suspension of respondent's license as the proper sanction in this matter. Support for the issuance of this sanction is found in the testimony of Mr. James R. Frazier. There, the decisive factors which entered into complainant's consideration for this recommendation were discussed. Among those factors were included: number of violations (15); the seriousness of the violations (i.e., Mr. Frazier testified that the failure to account truly and correctly is considered the most serious violation of the PACA because it represents a violation of a fiduciary relationship); the amount of money involved (\$9,410.28); the impact of the violations on the industry as a whole; the interests of the Secretary in ensuring that the trust relationship which exists between members of the industry—the basis for virtually every transaction in this multibillion dollar industry—is maintained; that respondent has reimbursed its principals; and the respondent's past history.

On the otherhand and as shown in finding of fact 11, the 15 violations which occurred over a two-year period of time represent less than 1% of respondent's interstate commerce transactions. Much like the situation in the *Sol Salins* case, 99% of respondent's interstate business is the dealer/purchase transactions. Where the consignment transactions took place, the transactions were often an accommodation to a broker who sought to find a market for the produce. In addition, record problems experienced in the past hopefully will be corrected in the future through the employment of a comptroller and the use of a computer. (Tr. 112, 191-193, 217-218). This is not to suggest that a strong sanction should not be imposed, but to show that the type of sanction imposed in *Sol Salins, supra*, is more consistent with the type of business conducted by respondent, in which less than 1% of its interstate commerce transactions are consignments, the subject of this proceeding.

Accordingly, a 10-day suspension of respondent's license is hereby imposed together with a 45-day suspension with respect to respondent's handling of produce on consignment, or in any other fiduciary capacity. The overall 10-day suspension of license will have an economic impact of about \$220,000, out of a total \$8,000,000 in interstate transactions. ($\$8,000,000 \times 10/365$).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends on appeal that the ALJ's findings of fact are not supported by adequate evidence. But the record abundantly supports the ALJ's findings.

Respondent challenges the methodology of complainant's investigation because complainant "uses an *average of all* transactions approach rather than examine in detail the actual transactions" (Original Brief at 4). However, complainant used an average, rather than the actual details, because respondent's records failed to reveal accurately the actual details, as required by the Act and regulations (7 U.S.C. § 499i; 7 CFR § 46.14(a), .15, .18-.20, .22, .23, .29). The lot numbers, which are required by the regulations to be recorded on the sales tickets (7 CFR § 46.19, .20), were omitted in many cases, or they were incorrect in many other cases. Since respondent failed to keep accurate records, as required, complainant used an approach which took the average sales price of all transactions during the few days that produce from each lot could have been sold by respondent. This method was "approved" in the similar case of *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1708-14 (1978), although it was recognized in *Salins* that "complainant's method produced a higher gross sales figure for the consignment than it probably commanded and tends to maximize estimates of underpayments" (Finding 43; 37 Agric. Dec. at 1712).

Contrary to respondent's assertion (Original Brief at 6), the respondent in *Salins* did not agree to complainant's methodology, but, rather, advanced a different methodology producing lower estimates of underpayments (37 Agric. Dec. at 1711-12). However, complainant's methodology was "approved" since the licensee's failure to faithfully record the lot numbers on the sales tickets, as required, caused the uncertainty (37 Agric. Dec. at 1708-14).

Complainant's methodology was approved in *Salins* only in a limited sense. That is, prior to the institution of the disciplinary proceeding, the respondent in *Salins* paid the amount determined to be owed under complainant's methodology, just as respondent did in the present case. And it was held in *Salins* that it "is unnecessary to determine the . . . exact amount of the underpayments" (37 Agric. Dec. at 1733 n.3). That holding is equally applicable here. Hence in *Salins*, as here, complainant's methodology is not a serious issue.

However, I believe that where a licensee's records do not support its accountings to consignors, complainant should *where practicable*, use judgment in determining underpayments, rather than follow an inflexible, average sales price approach. For example, if inspection reports show that a particular lot of produce in question

was poor quality, and that all other produce on hand was high quality, complainant should exclude top sales figures that are obviously not from the lot in question. However, if the top sales prices were excluded when other poor quality produce was also on hand, an average determined by excluding the top sales prices might be too low, because the lowest figures included in the average might have been from other poor quality produce. Where the uncertainty is caused by a licensee's failure to handle fiduciary transactions as required by the Act and regulations, it is better to overestimate, rather than underestimate, the amount owed to consignors.

Respondent argues that it had "hard copy" records, which were not the ones required by the regulations to be accurately kept, that would have supported respondent's accountings in the consignment transactions. But those "hard copy" records were never furnished to the Department's investigators, and were never produced at the hearing in this case. Accordingly, no weight is given to respondent's assertion in its brief as to what they show.

Although the Department's principal investigator indicated that he would not have relied on the "hard copy" records, even if they had been furnished to him (since they were not the records required by the regulations to be accurately kept), they would have been relevant evidence that would have been considered by the ALJ and the Judicial Officer, if they had been introduced at the hearing. However, it is difficult to speculate as to the weight that would have been given to such records, if produced at the hearing, particularly since they were not furnished to the Department's investigators. They would not have been given substantial weight unless it were found that they were genuine, contemporaneous records of the actual sales prices. If such a finding had been made, they would have been given substantial weight in determining the exact amount of the underpayments, notwithstanding respondent's failure to record the correct information on the records required to be kept by the regulations. (Even if respondent had shown that there were no underpayments, the sanction would not have been significantly different, see *infra*).

In addition, the assertion in respondent's brief that the "hard copy" records would have supported respondent's original accountings in the consignment transactions is undercut by the testimony of Milton Kaplan, president and operating officer of respondent, who owns the respondent corporation with his wife. Mr. Kaplan testified that he never checked the "hard copy" records to determine whether they conflict with the Department's audit. Specifically, Mr. Kaplan testified (Tr. 293):

Judge LIEBERT: Well, now, coming back to the lot sheets. Did you have, when you saw the results of Mr. Leming's audit, did you have occasion to go back to the cards, the hard copy, to find out what your records showed with respect to the amounts that Mr. Leming said was your obligation?

In other words, did you check him out to find out whether your records supported his audit or not?

The WITNESS: Mr. Leming—the reason that I didn't, or one of the reasons, are that I have a tremendous responsibility trying to do my job. We are understaffed, and it would be almost an impossible thing for me to—after I get done at 1:00 in the morning, and by the time he gets rolling it's usually 1:00 or 2:00 in the afternoon—so I am not about to go through the book work.

Similarly, respondent's office manager testified that they did not go to their "hard copy" records to determine whether those records supported respondent's original accountings, but that they merely paid what the Department's investigator said they owed (Tr. 254-55). Hence there is no basis for believing that anyone ever bothered to check the "hard copy" records to determine whether they would have supported respondent's original accountings in the consignment transactions at issue here.

Based on all the circumstances here, no weight can be given to respondent's contention that it had records other than those required to be kept accurately by the regulations that would have demonstrated the accuracy of its original accountings.

The ALJ properly found that respondent's violations were willful, within the meaning of the Administrative Procedure Act. Since the violations were willful, respondent's license could have been suspended even if respondent had never received any warning letter. That is, under the Administrative Procedure Act (5 U.S.C. 558(c)),³ in order to suspend a PACA license, (i) the violation must

³ Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

be willful, or (ii) the licensee must have been given a prior warning, with opportunity to demonstrate or achieve compliance with all lawful requirements. But here we have a prior warning letter as well as willful violations.

Respondent is under the mistaken impression that, with respect to warning letters, a separate warning letter is required as to each violation. But where a warning letter is necessary (*i.e.*, in the case of a non-willful violation), after one warning letter has been sent to a licensee for a prior violation, no subsequent warning letter is necessary as to subsequent, similar violations (*In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1576-82 (1971)). As stated in *American Fruit Purveyors* (30 Agric. Dec. at 1582):

It is clear that only one notice is required by section 9(b) of the Administrative Procedure Act, that is, once a licensee has been adequately warned, if he subsequently violates the Act, the agency may proceed to suspend his license without any further warning, notice, or opportunity to demonstrate informally that he did not violate the Act.

Both complainant and respondent appeal from the sanction imposed by the ALJ. It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings since 1972.

The basis for the Department's sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974),⁴ set forth in the Appendix to this decision.⁵ The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

⁴ The Department's severe sanction policy did not originate with *Worsley*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

⁵ Severe sanctions issued pursuant to this policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd*, 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyh v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978); *In re Livestock*

Respondent's violations are particularly serious since they involve a violation of its fiduciary duty. As stated in *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732-33 (1978), quoting from *In re Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 695-96, 701 (1965), *aff'd sub nom. Mandell, Spector, Rudolph Co. v. United States*, 364 F.2d 889 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967):

In addition, respondent was operating as a commission merchant or factor in consignment transactions and as a joint venturer in the joint account transaction, in both of which capacities respondent had a *fiduciary* duty to account truly and correctly, to keep adequate and accurate records identifying individual shipments of produce, to remit funds owing and not to commingle the goods of its principals or partners with its own or that of others. It is axiomatic that in this position of trust and confidence discrepancies or confusions created by respondent are to be resolved against it. * * *

* * * * *

In determining the sanction to be imposed herein, it must be kept in mind that the major violations of the act found herein, that is, the violations of section 2(4) thereof, are, in our opinion, the most serious and flagrant type possible under the act. Such violations involve breaches of fiduciary duty by an agent to his principal and by a joint account partner to his joint venturer. The relationship of respondent to the shippers here was one of trust and confidence calling for a high degree of care, honesty and loyalty to the consignors and joint venturers.

Also, as stated in *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1734 78):

rketers, Inc., 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 76), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re re Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 71r 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 522 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re veddo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 1r. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 52d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

Respondent's recordkeeping violations, which are intertwined with respondent's accounting violations, are also serious violations of the Act inasmuch as accurate records are essential to effective enforcement of a Federal regulatory program. See, e.g., *United States v. Ruzicka*, 329 U.S. 287, 288-289; *United States v. Darby*, 312 U.S. 100, 124-125; *Electric Bond Co. v. Comm'n*, 303 U.S. 419, 439; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194, 204-216; *Baltimore & Ohio RR. v. Interstate Com.*, 221 U.S. 612, 620-623; *Hyatt v. United States*, 276 F.2d 308, 312 (C.A. 10); *Panno v. United States*, 203 F.2d 504, 510 (C.A. 9); *United States v. Turner Dairy Co.*, 166 F.2d 1 (C.A. 7), certiorari denied, 335 U.S. 813; *United States v. Turner Dairy Co.*, 162 F.2d 425, 425-428 (C.A. 7), certiorari denied, 332 U.S. 836; *Bartlett Frazier Co. v. Hyde*, 65 F.2d 350 (C.A. 7), certiorari denied, 290 U.S. 654; *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1529 (1977).

The ALJ, citing *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735-38 (1978), suspended respondent's license for 45 days insofar as it involves respondent's handling of produce on consignment or in any other fiduciary capacity, but for only 10 days insofar as it involves respondent's buying or selling of produce as a dealer. However, in *Salins*, which is very similar to the present case, the Judicial Officer suspended Salins' license for 90 days insofar as it involved fiduciary transactions, and 21 days insofar as it involved buying or selling as a dealer.

In *Salins*, as in the present case, the violations relate only to consignment transactions, which were a trivial part of the total businesses—in *Salins*, .5%; in the present case, .11%.⁶

In *Salins*, complainant's methodology resulted in "underpayments in 26 consignment transactions totalling \$5,956.32," together with 12 overpayments, out of a total of 87 consignment transactions handled in the year (Findings 11, 49; 37 Agric. Dec. at 1704, 1713). In the present case, respondent handled fewer consignment transactions in the 2-year audit period, viz., 15, underpaying in 9 transactions totaling \$9,782.64 (under complainant's methodology), and overpaying in 6 consignment transactions totaling \$372.36, for

⁶ Respondent states that its consignment transactions amount to ".0011% of respondent's interstate business" (Original Brief at 8). But respondent neglected to move the decimal point two places to the right when converting to a percentage figure, i.e., \$9,410.28 - \$8,333,333 = .001129, or .11%.

a net underpayment of \$9,410.28 (under complainant's methodology).⁷

Significantly, in the present case, in *every* consignment transaction handled by respondent during the 2-year audit period, respondent violated the Act and regulations by failing to keep accurate records to support its accountings to consignors. That was not true in *Salins*.

Furthermore, the first reason given by the Judicial Officer for imposing a much less severe sanction in *Salins* than the 90-day suspension requested by complainant is that "respondent has already incurred an expense of \$9,000 to hire auditors to make the investigation which complainant would otherwise have had to make" (37 Agric. Dec. at 1735). That significant mitigating circumstance is not present here.

Also, in *Salins*, the corporation engaged in business in the District of Columbia, and all of its business was subject to the Act, and, therefore, the corporation was required to completely close its doors for a period of 21 days. In the present case, on the other hand, two-thirds of respondent's business is in intrastate commerce not subject to the Act. Presumably, therefore, even during the suspension period, respondent will continue to engage in a large, intrastate business.

Considering all of the circumstances, I believe the 21-day suspension period in *Salins* should be increased to 30 days here. However, since complainant contends that imposing an additional, longer suspension period only on respondent's fiduciary transactions is administratively burdensome, an additional 90-day suspension of respondent's fiduciary transactions will not be ordered here or in any future PACA case.

The suspension period should not be longer than 30 days since there is no indication that respondent intentionally underpaid consignors in consignment transactions, or that respondent underpaid consignors a large amount. (The \$9,410.28 figure referred to above, based on an average of all sales, is undoubtedly on the high side.) Moreover, the suspension period should not be for a longer period than 30 days in view of the tremendous size of respondent's business, and the fact that consignment transactions were a trivial part of its produce business.

⁷ As stated in *Salins*, respondent's "overpayments do not subtract from respondent's underpayments in determining the number of violations" since overpayments may be used unfairly, and are prohibited by the Act (37 Agric. Dec. at 1733). Also, it is no comfort to a consignor who has been underpaid to know that some other consignor has been overpaid.

Respondent refers in its brief to *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542 (1971), in which a 14-day suspended suspension order was issued for prompt payment violations (Original Brief at 10). But it was explained in the ruling on reconsideration in that proceeding (*In re American Fruit Purveyors, Inc.*, 31 Agric. Dec. 122, 127 (1972):

If this Decision raises expectations in the industry of lenient sanctions for serious or flagrant violations, their expectations will be short-lived. . . .

The lenient sanction was issued in this case solely because the complainant failed to prove a convincing case.

See, also, *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385-87 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

Respondent argues that *In re John H. Norman & Sons Distributing Co.*, 37 Agric. Dec. 705 (1978), "is instructive in that it provided for suspension of a sanction of suspensions" (Original Brief at 11). However, although *Norman* states in dicta that a suspended suspension order can be issued under the Act, the holding in that case is that the suspended suspension order imposed by the ALJ "was contrary to the Department's settled sanction policy" (37 Agric. Dec. 719). Instead of a suspended suspension order, the Judicial Officer published the finding that respondent had committed repeated, flagrant and willful violations of the Act (37 Agric. Dec. at 721), which had the same effect on the respondent and those "responsibly connected" with the respondent as a revocation of its license (37 Agric. Dec. at 714-15).

Respondent contends that in *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975), no sanction was issued against the license as it terminated because of bankruptcy (Original Brief at 11). But in *Tragash*, as in *Norman*, a finding was made that the respondent had committed willful, flagrant and repeated violations of the Act, which had the same effect as a license revocation order (33 Agric. Dec. at 1914).

Considering all of the circumstances in this case, the following Order should be issued.

ORDER

Respondent's license is suspended for 30 days.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

This order shall be effective on the 20th day after service thereof on the respondent.

APPENDIX

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. SANCTION POLICY

[Excerpt omitted.—Ed.]

In re: THE SLAW HOUSE, INC. PACA Docket No. 2-6570. Decided December 19, 1984.

Failure to make full payment promptly—Revocation of license.

Respondent purchased, received, and accepted perishable agricultural commodities from 13 sellers but failed to make full payment promptly. Respondent's license was revoked.

Edward M. Silverstein, for complainant.

Leo E. Costello, Birmingham, Alabama, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 449a *et seq.*), hereinafter referred to as the "Act," instituted by a complaint filed on June 7, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that, during the period May 1983 through March 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from 13 sellers, 86 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$124,594.31.

A copy of the complaint was served upon respondent, and respondent filed an answer in which it generally denied the material allegations of the complaint. Thereafter, complainant requested that a date certain for hearing be set. In response thereto, a notice of hearing was issued on August 3, 1984, establishing November 15, 1984, as the date for hearing. Subsequent to complainant's request to change the date of hearing, an Order Rescheduling Hearing was issued on August 9, 1984, in which the hearing date was changed to November 29, 1984. All notices of hearing were served on respond-

ent's counsel, Leo E. Costello, Esq., Costello & Stott, 3716 S. 5th Ave., Birmingham, Alabama 35222.

On November 26, 1984, the aforementioned Mr. Costello, the Administrative Law Judge, and Edward M. Silverstein, Esq., representing complainant, took part in a pre-hearing conference by telephone call. During this conversation, Mr. Costello indicated that the individuals who had a financial interest in respondent corporation during the period of the violations no longer were interested in defending this proceeding, and that the person who now owned all of the stock in the respondent corporation, a Mr. Clyde Walker, had not been in touch with him for a long period of time. Mr. Costello further indicated that he believed that Mr. Walker was informed that the proceeding had been set for hearing on November 29, 1984, in Birmingham, Alabama. Accordingly, on November 29, 1984, a hearing was convened in Birmingham, Alabama, before Administrative Law Judge John A. Campbell. Complainant was represented by Edward M. Silverstein, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D. C. Respondent was not represented by counsel, or otherwise. The record was opened, and evidence, consisting of the testimony of Mr. John M. Clark who conducted the investigation on behalf of the P.A.C.A. Branch and three documents, was admitted. On the basis of this evidence, it is held that the complainant has satisfied its burden of proving that respondent has committed willful, repeated, and flagrant violations of the Act. Therefore, the following Decision and Order is issued. It is further noted that pursuant to 7 CFR § 1.141(e) a respondent which fails to appear at a hearing without good cause is deemed to have waived its right to an oral hearing, and to have admitted any facts which may be presented at that hearing. Such failure also constitutes an admission of all the material allegations of fact contained in the complaint.

FINDINGS OF FACT

1. Respondent, The Slaw House, Inc., is a corporation whose last known mailing address is 420 Finley Ave. W, Birmingham, Alabama 35204.

2. Pursuant to the licensing provisions of the Act, license number 821266 was issued to respondent on June 9, 1982. This license was renewed annually, and was next subject to renewal on or before June 9, 1984.

3. As more fully set forth in paragraph 5 of the complaint, during the period May 1983 through March 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from 13 sellers, 86 lots of fruits and vegetables, all being perishable

agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$124,594.31.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 86 transactions set forth in Finding of Fact 3, above, constitutes willful, repeated, and flagrant violations of Section 2 of the Act (7 U.S.C. 499(b)), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing the procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 CFR §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 30, 1985.—Ed.]

In re: D. S. RUSSELL AND SONS, INC. PACA Docket No. 2-6644. Decided December 19, 1984.

Failure to make full payment promptly—Publication of the facts.

Respondent purchased, received, and accepted perishable agricultural commodities from 10 sellers but failed to make full payment promptly. Facts and circumstances were ordered, to be published.

Edward M. Silverstein, for complainant.

John M. Cloud, Norfolk, Virginia, for respondent

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 18, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period

February through July 1983, respondent purchased, received and accepted, in interstate commerce, from ten sellers, 32 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$114,479.51.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, D. S. Russell & Sons, Inc., is a corporation, whose address is 3521 Virginia Beach Blvd., Norfolk, Virginia 23502.

2. Pursuant to the licensing provisions of the Act, license number 203424 was issued to respondent on February 5, 1964. This license terminated on February 5, 1984, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period February through July 1983, respondent purchased, received and accepted in interstate commerce, from ten sellers, 32 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$114,479.51.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 32 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service has pro-

vided in Sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final January 31, 1985.—Ed.]

In re: LIVESLEY TRADING CO. PACA Docket No. 2-6649. Decided January 7, 1985.

Failure to make full payment promptly—Publication of the facts. Respondent purchased, received, and accepted perishable agricultural commodities from 27 sellers but failed to make full payment promptly. Facts and circumstances were ordered to be published.

Edward M Silverstein, for complainant.
Respondent, *pro se*

Decision by Vincent W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 1, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1983 through January 1984, respondent purchased, received, and accepted, in interstate commerce, from 27 sellers, 152 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$346,797.66.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Livesley Trading Co., is a corporation, whose address is 930 S.E. Ninth Avenue, Portland, Oregon 97214.

2. Pursuant to the licensing provisions of the Act, license number 160000 was issued to respondent on August 15, 1959. This license terminated on August 15, 1984, pursuant to Section 4(a) of the Act

(7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period February 1983 through January 1984, respondent purchased, received, and accepted in interstate commerce, from 27 sellers, 152 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$346,797.66.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 152 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order was initially ordered final February 13, 1985, but the final date was subsequently changed to February 18, 1985.—Ed.]

In re: ASSOCIATED FOOD SERVICES, INC., d/b/a ASSOCIATED/ROMNEY
FOOD SERVICES. PACA Docket No. 2-6605. Decided December 7,
1984.

Failure to make full payment promptly—Unlicensed but subject to licensing provisions—Publication of the facts.

Respondent purchased, received, and accepted perishable agricultural commodities from 29 sellers but failed to make full payment promptly. Respondent was subject to the licensing provisions of the Act but was not licensed. Facts and circumstances were ordered to be published.

Edward M. Silverstein, for complainant.

Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 31, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June through November 1983, respondent purchased and accepted, in interstate and foreign commerce, from 29 sellers, 192 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$428,341.28.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Associated Food Services, Inc., is a corporation, doing business as Associated/Romney Food Services, whose address is 6969 Market Avenue, El Paso, Texas 77915.

2. Respondent is not, and was not, licensed under the Act. It, however, carried on the business of a commission merchant, dealer or broker, as those terms are defined in section 1 of the Act (7 U.S.C. 499a) and was, therefore, subject to the licensing provisions of the Act at the time of the transactions alleged herein.

3. As more fully set forth in paragraph 5 of the complaint, during the period June through November 1983, respondent purchased and accepted in interstate and foreign commerce from 29 sellers, 192 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$428,341.28.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 192 transactions set forth in Finding of Fact No. 3, above,

constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order become final February 16, 1985.—Ed.]

In re: G A B PRODUCE DISTRIBUTORS, INC. PACA Docket No. 2-6645.
Decided January 2, 1985.

Failure to make full payment promptly—Terminated license due to failure to pay required fee—Publication of the facts.

Respondent purchased, received, and accepted perishable agricultural commodities from 12 sellers but failed to make full payment promptly. Respondent's license under the Act had been terminated due to failure to pay required fee. Facts and circumstances were ordered to be published.

Edward M. Silverstein, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 21, 1984, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January through June 1983, respondent received and accepted 31 lots of Mexican vegetables on consignment from three shippers but

failed to make full payment promptly to them of the net proceeds thereof in the total amount of \$15,925.99, and that during the period January through June 1983, respondent purchased, received and accepted, in interstate and foreign commerce, from nine sellers, 57 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$130,222.65.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, G A B Produce Distributors, Inc., is a corporation, whose address is Terminal #1, Nogales, Arizona 85621.

2. Pursuant to the licensing provisions of the Act, license number 810334 was issued to respondent on December 16, 1980. This license was renewed annually, but terminated on December 16, 1983, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period January through June 1983, respondent received and accepted in foreign commerce, from three shippers, 31 lots of vegetables, all being perishable agricultural commodities, imported into the United States from Mexico, on consignment but failed to make full payment promptly of the net proceeds derived therefrom to these shippers in the total amount of \$15,925.99.

4. As more fully set forth in paragraph 6 of the complaint, during the period January through June 1983, respondent purchased, received and accepted in interstate and foreign commerce from nine sellers, 57 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$130,222.65.

CONCLUSIONS

Respondent's failures to make full payment promptly with respect to the 88 transactions set forth in Findings of Fact Nos. 3 and 4, above, constitute willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final February 19, 1985.—Ed.]

In re: TRI-STATE FRUIT & VEGETABLE, INC. PACA Docket No. 2-6619. Decided February 22, 1985.

Appeal of two initial findings lacking legal consequence—Failure to make full payment promptly—Publication of the facts.

The Judicial Officer affirmed Judge Baker's order publishing the finding that respondent has committed repeated and flagrant violations of the Perishable Agricultural Commodities Act. Respondent challenges on appeal the ALJ's finding that respondent's license terminated on May 3, 1984, and the ALJ's conclusion that respondent's failure to make payment was willful. Since neither finding is opposed by complainant, and neither finding is of legal significance, the findings are amended in accordance with respondent's appeal.

Edward M. Silverstein, for complainant.

Gene Krekel, Burlington, Iowa, for respondent.

Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order on January 10, 1985, publishing the finding that respondent has committed repeated and flagrant violations of § 2(4) of the Act (7 U.S.C. § 499b(4)).¹

¹ See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and Aug. 1984 Supp.),

On February 8, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).² After complainant responded to the appeal, the case was referred to the Judicial Officer for decision on February 20, 1985.

Respondent's appeal is limited to challenging (i) the ALJ's finding that respondent's license terminated on May 3, 1984, and (ii) the ALJ's conclusion that respondent's failure to make full payment for produce was willful. Since changing these findings and conclusions in accordance with respondent's appeal would have no legal consequence, and is not opposed by complainant, the findings and conclusions are revised herein as requested by respondent.

FINDINGS OF FACT

1. Respondent, Tri-State Fruit & Vegetable, Inc., is a corporation, whose mailing address is Post Office Box 1123, Burlington, Iowa 52601.

2. Pursuant to the licensing provisions of the Act, license number 821043 was issued to respondent on May 3, 1982. This license is no longer in effect. Respondent's answer states that "said license was surrendered in December of 1983."

3. As more fully set forth in paragraph 5 of the complaint, during the period March through October 1983, respondent purchased and accepted in interstate and foreign commerce from seven sellers, 37 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$157,483.40.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 37 transactions set forth in Finding of Fact No. 3, above, constitutes repeated and flagrant violations of § 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980 and May 1982 Supp.).

² The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No 2 of 1953, 18 Fed Reg 3219 (1953), reprinted in 5 U.S.C. app at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer, and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ORDER

Respondent, Tri-State Fruit & Vegetable, Inc., has committed repeated and flagrant violations of § 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)). The facts and circumstances set forth above shall be published.

REPARATION DECISIONS

MENDELSON-ZELLER CO., INC. v. PURITY SUPREME INC. PACA Docket
No. 2-6443. Decided January 4, 1985.

Andrew Y Stanton, Presiding Officer.

Unloading constituting acceptance—Reparation awarded.

Complainant, *pro se*

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,653.34 in connection with a load of strawberries in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant elected to submit no additional evidence. Respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Mendelson-Zeller Co. Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California.

2. Respondent, Purity Supreme Inc., is a corporation whose address is 312 Boston Road, North Billerica, Massachusetts. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On April 13, 1983, complainant sold to respondent a truckload of strawberries containing 2,472 trays of \$6.00 per tray, plus \$.60 per tray for cooling and pallets, \$18.50 for Tectrol and \$11.25 for a Ryan thermometer, for a total contract price of \$16,807.45 f.o.b. The parties understood that the transit temperature was to be between 34° and 36°F. It was not agreed that the strawberries were to be of any particular grade. Neither was it agreed that the straw-

berries were to originate from only one lot. Bruno Dispoto Company, Delano, California, acted as the broker.

4. On April 13, 1983, complainant loaded the strawberries onto a truck for shipment to respondent. At that time, the pulp temperature of the fruit was found to be 38°F. Complainant shipped the strawberries in interstate commerce to respondent, where they arrived on approximately April 18, 1983, and were unloaded and accepted.

5. After arrival, a federal inspection was taken on April 18, 1983, which found as follows, in relevant part:

Condition of Equipment:	Temperature control unit in operation.
Products Inspected:	STRAWBERRIES in pint cups in fiber-board trays branded, "Crimson King, Mendelson-Zeller, San Francisco, Calif. 94111, 12 dry pint baskets, Catl." Applicant's count: 1704 trays on trailer; 768 trays Unloaded. See "Remarks."
Condition of Load:	Trailer partly unloaded Stacked within 12 feet of rear. 1 to 2 pallets wide 16 layers, 3 rows per pallet. UNLOADED LOT. Stacked on pallets at above location.
Condition of Pack:	BOTH LOTS: Well filled.
Temperature of Products:	ON TRAILER 42-43°F; UNLOADED. 43°F.
Size:	BOTH LOTS: Berries medium to large. No undersize.
Quality:	BOTH LOTS: Berries clean, well developed, generally well to fairly well colored, calyxes attached. Grade defects average 5% in Loaded Lot; average 4% in Unloaded Lot mostly poorly colored berries.

Condition:	BOTH LOTS: Generally ripe and firm, fairly bright, calyxes green color LOADED LOT Average 2% damage by soft leaky berries. Average 2% damage by bruising. Less than 1/2 of 1% decay. UNLOADED LOT: Range 4 to 25% in most samples, some none, average 7% by bruising. In many samples 5 to 75%, in most samples none, average 14% damage by soft, leaky berries. No decay.
Grade:	UNLOADED LOT: Meets quality requirements but fails to grade U.S. No. 1 only account of condition. LOADED LOT. U.S. No. 1.
Remarks:	Applicant states Unloaded Lot unloaded from trailer number CABT01189. LOADED LOT: Inspection and certificate restricted to product on 8 pallets at rear of portion of load remaining at time of inspection.

6. Respondent has paid complainant \$14,154.11 for the strawberries, which is \$2,653.34 less than complainant claims is due and owing.

7. A formal complaint was filed on October 3, 1983, which was within nine months from which the cause of action herein accrued.

CONCLUSIONS

Respondent's reason for failing to pay complainant the entire contract price for the 2,472 trays of strawberries purchased is that a federal inspection taken upon their arrival disclosed that eight pallets were in inferior condition, a breach of warranty by complainant. It is respondent's contention that these eight pallets came from a different lot than the remaining 18 pallets and should thus be considered separately for the purpose of determining the existence of a breach of warranty. Respondent further contends that the bill of lading shows the strawberries exhibiting a pulp temperature of 38°F. at shipping point, which also evidences a breach of warranty.

Respondent admits accepting the 1,704 trays remaining on board the trailer at the time of the April 18, 1983, inspection. Respondent denies accepting the 768 trays unloaded at that time, but the act of unloading is an assertion of dominion which constitutes acceptance

by respondent. *Mario Saikhon v Russell-Ward Company*, 34 Agric. Dec. 1940 (1975). Having accepted the strawberries in this f.o.b. transaction, respondent became liable for their contract price, less damages resulting from any breach of warranty by complainant. Respondent bears the burden of proving both the breach and damages by a preponderance of the evidence. *Pleasant Valley Co-op v. Robt. T. Cochran & Co., Inc.*, 41 Agric. Dec. 1208 (1982). The April 18, 1983, inspection reveals minimal damage in the 1,704 trays remaining on the trailer, and substantial damage in the 768 trays that had been unloaded. Respondent urges that we treat these as two separate lots for the purpose of determining whether there was a breach of warranty as complainant admits that the strawberries in question came from two lots rather than one. However, there is no evidence that the contract required the strawberries to originate from only one lot. Therefore, all 2,472 trays will be considered together in the determination of whether there was any breach of warranty. Viewed as a whole, the entire load of strawberries averaged about 4% damage by bruising and 6% damage by leaky berries. This meets the good delivery standards for the no grade strawberries present here.

Respondent's claim that the 38°F pulp temperature present at shipping point demonstrates a breach of warranty is unfounded, as that temperature indicates that the cooling required by the contract was properly carried out by complainant.

Respondent has failed to sustain its burden of proving the existence of a breach of warranty. It is thus liable for the \$16,807.45 contract price less the \$14,154.11 already paid, or \$2,653.34. Respondent's failure to pay this sum is a violation of Section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$2,653.34, with interest thereon at the rate of 13% per annum from May 1, 1983, until paid.

SMITH FOOD SALES, INC. v. TRADE WEST MERCHANDISING, INC. PACA
Docket No. 2-648. Decided January 4, 1985.

Accrual of cause of action—Statute of limitations—Dismissal.

Where complainant failed to bring a complaint within nine months after the respondent's initial failure to pay for a shipment of frozen corn, the complaint is dismissed despite the fact that the complaint was brought less than nine months after the failure of the respondent to meet a second, extended payment deadline.

George S. Whitten, Presiding Officer

Milan O. Smith, Jr., Torrance, California, for complainant.

Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, (1930), as amended (7 U.S.C. 499a *et seq.*). Complainant filed a formal complaint in which it seeks to recover the sum of \$5,250.38 in connection with the sale of a load of frozen corn on the cob to respondent.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed as damages herein does not exceed \$15,000.00, and accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified complaint and answer are considered a part of the evidence, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and respondent filed an answering statement. Complainant did not file a statement in reply. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Smith Food Sales, Inc., is a corporation whose address is P.O. Box 790, Pendleton, Oregon.

2. Respondent, Trade West Merchandising, Inc., is a corporation whose address is P.O. Box 40148, Portland, Oregon. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about September 15, 1982, Smith Frozen Foods, Inc., sold to respondent 650 cases of size 1/48 cob corn, 5½" grade AAC or better, at \$7.50 per carton, f.o.b. Weston, Oregon, for delivery to "Trade West % Alasa Maru Voyage 11 Showa Lines BKG PLP 1365 Port of Portland FGN DEST:NAHA OKINAWA". Delivery to dock was to be on or about September 28, 1982.

4. On September 20, 1982, complainant issued a confirmation of sale showing the corn as sold for the account of Smith Frozen Foods, Inc. and showing the terms as "2% 10 Net 30".

5. The corn was shipped on September 27, 1982, and delivered to dock side on or about September 28, 1982. The corn arrived in Okinawa, Japan, approximately one month later.

6. Smith Frozen Foods, Inc., on December 22, 1982, assigned all of its rights in the subject frozen cob corn to complainant.

7. Under the payment terms agreed to by the original parties to the contract, payment was due on or before October 28, 1982. Such payment was not made. Thereafter, Kelly W. Brown, vice president of Marketing for complainant and also vice president of Marketing for Smith Frozen Foods, Inc., agreed with respondent to an extension of time for payment until March 11, 1983.

8. An informal complaint was filed on August 24, 1983, which was not within nine months after the cause of action applicable to the frozen cob corn accrued.

CONCLUSIONS

In its opening statement complainant submitted an affidavit by Kelly W. Brown, vice president of Marketing for both complainant and Smith Frozen Foods, Inc. Mr. Kelly stated in relevant part as follows:

. . . the original agreement provided for payment by TRADE WEST to be net in 30 days or at a 2% discount if paid within 10 days. When payment became due I discussed with HALVORSON the reason for nonpayment. We concluded a series of oral extension agreements in telephone conversation from and after October 28, 1982, until and including March 11, 1983.

Complainant claims that since the informal complaint was filed on August 24, 1983, or within nine months after the March 11, 1983, extended date for payment, such informal complaint was filed within the nine month period required by the Act.

Section 6(a) of the Act provides in relevant part that:

Any person complaining of any violation of any provision of Section 2 of this Act by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, . . .

Unlike the usual statute of limitations this provision is jurisdictional in nature. *H & M Banana Co. v. Rakovich*, 18 Agric. Dec. 504 (1959). The agreement by the parties to the original contract to extend the time for payment, after respondent had already failed to meet the first payment due date, has no effect on the time when

the original cause of action accrued. The general rule is that a cause of action accrues when the right to institute and maintain a suit arises. *Boler Fruit & Veg. Co. v. Kenworthy*, 19 Agric. Dec. 226 (1960). Since the informal complaint was filed more than nine months beyond this date the Secretary lacks jurisdiction over the subject matter of the complaint. Accordingly, the complaint should be dismissed.

The complaint is dismissed.

KAPLAN'S FRUIT & PRODUCE CO., INC. v. HOULEHAN, INC. PACA
Docket No. 2-6495. Decided January 4, 1985.

F.O.B. sale—Inspection of less than half the units—Reparation awarded.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, (1930), as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$3,081.10 in connection with the sale of a partial truckload of strawberries in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000.00 the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. Although both parties were given an opportunity to file briefs, neither party did so.

FINDINGS OF FACT

1. Complainant, Kaplan's Fruit & Produce Co, Inc., is a corporation with an address at P.O. Box 21847, Los Angeles, California.
2. Respondent, Houlehan, Inc., is a corporation with an address at 933 Ward Parkway, Room 225, Kansas City, Missouri. At the

time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On or about May 6, 1983, complainant sold to respondent 890 flats of strawberries at \$7.25 per flat for a total contract price of \$6,452.50, f.o.b. George DePaoli Company, Salinas, California acted as the broker with respect to the transaction. The transaction involved the sale of a partial truckload of strawberries.

4. The truck was loaded at complainant's loading point on May 6, or May 7, 1983. The truck belonged to respondent. On May 7, or May 8, 1983, respondent completed loading the truck with produce from another source. The truck departed California on May 7 or May 8, 1983, and arrived in Kansas City, Missouri on May 10, 1983. Respondent requested a federal inspection of 384 flats of strawberries, which was made on May 11, 1983.

5. The federal inspection showed in pertinent part as follows:

Products Inspected:

STRAWBERRIES in baskets placed in flats printed "Bobalu Bob Jones Ranch Oxnard, Ca." or printed "Cal. Fruit Brand Cal.—Fruit Los Angeles Ca." Inspector's Count 134 flats "Bobalu" and 250 flats "Cal. Fruit."

* * * * *

Condition:

Each lot: Generally ripe and firm and fairly bright to bright. Calyxes fresh and green. "Bobalu" lot: Serious damage by wet and leaking berries 4 to 60%, average 24%. Decay in most samples 4 to 10%, in many none, average 5%. "Cal. Fruit" lot: Serious damage by wet and leaking berries 8 to 26%, average 16%. Decay in most samples 8 to 20%, in many none, average 8%. *Each lot:* Decay is Rhizopus Rot mostly in advanced, many in early stages.

6. Respondent rendered an accounting to complainant which showed it sold 504 flats of strawberries for \$6.00 a flat, and 386 flats for \$.90 per flat. It paid complainant \$3,371.40, leaving a balance of \$3,081.10.

7. A formal complaint was filed on November 28, 1983, which was within nine months of when the cause of action herein accrued.

ORDER

This proceeding involves the shipment of a load of strawberries from California to Missouri. When respondent unloaded the straw-

berries from the truck, it accepted them. *Theron Hooker Company v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971). Therefore, it had the burden of proof to show that they did not make good delivery. *Sunfresh Distributing Company v. Frank Donia Company*, 43 Agric. Dec. ____ (1984). It attempted to do this by means of an inspection of 384 of the 890 flats which it purchased. However, it has long been held that an inspection of less than half of the units involved in a transaction does not reflect the true condition of the entire load. *Mario Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975); *Tom Bengard Ranch v. Tomatoes, Inc.*, 41 Agric. Dec. 1637 (1982); *Pandol Brothers, Inc. v. Anthony J. D'Acquisto, d/b/a Tropic Banana*, 43 Agric. Dec. ____ (1984). Therefore, we cannot accept the inspection as an accurate reflection of the condition of the load of strawberries, and must find that respondent has failed to sustain its burden of proof that they were not in suitable shipping condition when loaded on the truck in this f.o.b. transaction.

In addition, respondent has only provided a summary statement regarding prices it says were fetched. It claims it sold 504 packages of strawberries at \$6.00 and 386 packages of strawberries at \$.90 for a total price of \$3,371.40, which amount of money it remitted to complainant. Such statement is hardly evidentiary as to the actual prices fetched for the strawberries which were involved. It would also be inconsistent for respondent to have sold strawberries involving such high percentages of condition defects as it claims existed for two such disparate prices as \$6.00 per package and only \$.90 per package. This further shows the reasons we cannot accept the inspection as proof of the condition of the load.

Respondent has paid complainant \$3,371.40, leaving a balance of \$3,081.10 due to complainant, and we find that respondent's failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this Order respondent shall pay to complainant as reparation \$3,081.10, with interest thereon at the rate of 13% per cent per annum from June 1, 1983, until paid.

HARDEN FARMS OF CALIFORNIA v. ANGELO DI GIANCOMO. PACA
Docket No. 2-6402. Decided January 7, 1985.

Change of contract terms—Unloading constituting acceptance—Reparation
awarded.

Andrew Y. Stanton, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$4,486.00 in connection with the sale of a shipment of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in Section 47.20 (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant submitted an opening statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Harden Farms of California, is a corporation whose address is P.O. Box 779, Salinas, California.

2. Respondent, Angelo Di Giancomo, is a partnership composed of Joseph Pinto and Stanley J. Sussman, whose address is 74-76 Produce Market, 3300 Galloway Street, Philadelphia, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On October 14, 1982, complainant sold to respondent 790 cartons of no grade lettuce at \$5 per carton plus \$.65 per carton cooling and \$22.50 for a Ryan recorder, for a total of \$4,486.00 f.o.b. Lloyd Myers Co., Inc., Salinas, California, acted as the broker.

4. On October 15, 1982, complainant sent respondent an invoice, number 4101, reflecting the contract terms set forth in Finding of Fact 3. Respondent never objected to the description of the lettuce as being without a grade.

5. The lettuce was shipped in interstate commerce to respondent, where it arrived and was unloaded and accepted.

6. On October 19, 1982, respondent obtained a federal inspection of 550 cartons of lettuce shipped from complainant, which might have come from the load at issue or a different load of lettuce shipped on October 13, 1982. The inspection found as follows, in relevant part:

Products Inspected:	Iceberg LETTUCE in cartons printed, "Hard'n Fresh, 24 heads Lettuce, Harden Farms of California, Salinas, CA." Applicant's Court: Approximately 550 cartons
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* * *

Quality	Clean, fairly well trimmed, head leaves green color. Average 94% hard or firm, 6% fairly firm. Grade defects average 1% mechanical damage.
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Condition:	Heads or portions of heads not affected by condition defects are fresh and crisp. <i>Wrapper Leaves</i> : Average 1% decay. <i>Head leaves</i> : Average 5% damage by external Tipburn. From 3 to 6 heads per carton, average 18% damage by discoloration following bruising scattered throughout pack and lot Decay from 1 to 3 heads per carton, average 7% Bacterial Soft Rot in various stages affecting 1 to 2 outer leaves, mostly following Tipburn.
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Grade:	Meets quality requirements but fails to grade U.S. No. 1 only account condition
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Remarks:	Applicant states stock unloaded from trailer license Calif. AT-62237.
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7. Respondent sent complainant an account of sales, indicating that respondent had lost \$291.25 on the load of lettuce in dispute. Respondent has, to date, failed to pay complainant any part of the contract price for the lettuce.

8. A formal complaint was filed on June 27, 1983, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent contends that the load of lettuce at issue herein, sold and shipped by complainant on October 14, 1982, was in poor condition upon arrival at its place of business and that it requested and was granted authorization to handle the load on consignment. Respondent claims that the negotiations resulting in the change in the contract terms from an f.o.b. sale to a consignment were done through a broker. According to respondent, it incurred a loss of \$291.25 on its resale of the allegedly consigned lettuce. Complainant denies ever providing authorization for a consignment and insists that it is owed the entire f.o.b. contract price of \$4,486.00.

The first issue to be decided is whether the original f.o.b. contract terms were changed to a consignment. Respondent, as the party alleging such a change, has the burden of proving it by a preponderance of the evidence. *American Banana Co., Inc. v. Marvin Gray*, 41 Agric. Dec. 539 (1982). The only proof respondent has offered is a handwritten notation stating "consigned" which respondent made on an invoice received from complainant. This is self-serving and deserving of little, if any, evidentiary consideration. There is absolutely no evidence from the broker, who respondent claims negotiated the change to a consignment. In view of the lack of evidence in the record supporting respondent's position, we conclude that respondent has failed to sustain its burden of proof, and that the contract terms remained an f.o.b. sale.

Respondent does not deny receiving and unloading the lettuce. It, therefore, exercised dominion over the lettuce and is considered to have accepted it. *Mario Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975). Having accepted the load of lettuce, respondent became liable for the contract price, less damages resulting from any breach of warranty by complainant. Respondent has the burden of proving the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983). As this was an f.o.b. sale, complainant gave an implied warranty of suitable shipping condition which, according to 7 CFR 46.43(j), means that the commodity, at the time of billing, is in a condition which, if handled under normal transportation conditions, will assure delivery without abnormal deterioration at the contract destination. Respondent claims that on October 19, 1982, federal inspection revealed evidence of abnormal deterioration. However, in its answer, respondent alleges that the inspection covered both the load of lettuce in question and another load of lettuce purchased from complainant on October 13, 1982. Further doubt is cast on the identity of the lettuce inspected as being that alleged in the complaint by the fact

that the inspection was taken on 550 cartons, approximately $\frac{2}{3}$ of the 790 cartons contained in the load here at issue. Therefore, due to the questionable identity of the lettuce inspected, we cannot conclude that respondent has sustained its burden of proving a breach of contract by complainant.

Respondent is liable to complainant for the contract price of \$4,486.00, and its failure to pay this sum to complainant is a violation of Section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$4,486.00, with interest thereon at the rate of 13% per annum from November 1, 1982, until paid.

CARL DOBLER & SONS v. A & J PRODUCE CORPORATION. PACA
Docket No. 2-6478. Decided January 7, 1985.

Receipt of dual invoices—Broker's duties—Dismissed.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant

Phillip Weinstein, New York, New York, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodity Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$8,067.00 in connection with the sale of a truckload of lettuce in interstate commerce.

A copy of the Report of Investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer hereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000.00 the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement, and respondent

filed an answering statement. Both parties were given the opportunity to file briefs, and respondent did so.

FINDINGS OF FACT

1. Complainant, Carl Dobler & Sons, is a partnership composed of Carl F. Dobler and Ken W. Dobler, with a business address at 174 Struve Road, Watsonville, California.

2. Respondent, A & J Produce Corporation is a corporation with an address at 138-144 New York City Terminal Market, Bronx, New York. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On or about June 20, 1983, complainant sold 930 cartons of lettuce to respondent. Sureway Distributors Company, Salinas, California, was the broker. The price of the lettuce was \$10.00 per carton plus 65 cents per carton for cooling and \$22.00 for a Ryan Recording Thermometer, or a total contract price of \$9,927.00, f.o.b. The lettuce was shipped on June 20, 1983, from loading point in California to respondent's place of business in New York, where it was received and accepted by the respondent.

4. Respondent believed it was purchasing the lettuce from Sureway rather than from complainant. As a result of market decline in price respondent asked Sureway for a \$2.00 allowance. Sureway granted it that allowance, thereby reducing the total contract price to respondent to \$8,067.00. Sureway, in turn, at a time unspecified relative to respondent's request to it for an allowance, sought a \$2.00 allowance from complainant because of market decline. Complainant granted such allowance to Sureway.

5. Complainant sent its invoice dated June 24, 1983, to respondent. The invoice reflected that Sureway was the broker. The trucker, which is unidentified, issued a bill of lading which showed that the lettuce was being shipped by complainant to respondent. On a date which is uncertain respondent received and placed in its files the invoice of complainant.

6. Sureway did not issue a broker's memorandum of sale. Rather, it issued an invoice without date, which invoice stated that payment was to be made by respondent to Sureway. Complainant's name did not appear on the invoice. Respondent paid Sureway \$8,067.00 by check dated July 11, 1983. Sureway has not paid complainant with respect to this transaction.

7. A formal complaint was filed in this proceeding on December 5, 1983, which was within nine months after the cause of action herein accrued.

DISCUSSION

The dispute in this proceeding has its genesis in the failure of the broker, Sureway Distributors Company, fully to inform both parties as to the terms and conditions of the transactions, and possibly its failure to carry out its duties as a broker. Complainant believed that Sureway was acting a broker, and that it was selling its goods directly to respondent. Respondent, on the other hand, believed that it was buying the lettuce from Sureway, which had purchased it from complainant. Respondent received two invoices, one from complainant and one from Sureway, both of which indicated that the sender was to be paid for the lettuce involved. The record is not clear as to when either invoice was sent to or received by respondent. What is clear is that respondent paid Sureway by check on July 11, 1983. Sureway, however, did not make payment to complainant. Under these circumstances the question is who should suffer the loss as a result of Sureway's failure to pay complainant for the lettuce purchased and received by respondent.

As the proponent of the existence of a contract between itself and respondent, complainant has the burden to show that such contract existed, its pertinent terms, and that respondent committed a breach thereof. *New York v. Sandler*, 32 Agric. Dec. 702 (1973); *R. L. Peed & Company, Inc. v. F. & G. Produce, Inc.*, 32 Agric. Dec. 285 (1973). Based on our analysis of the facts available on the record in this proceeding we conclude that complainant has not proved that respondent contracted with it with respect to the lettuce, or that respondent breached any duty to complainant.

In an effort to prove its case complainant pointed out that its invoice was in the files of respondent. Although it could not show that the invoice had been placed in the files prior to July 11, 1983, when respondent issued its check to Sureway with respect to its transaction, we conclude that it is almost undoubtedly the case that the invoice was placed in respondent's files prior to that time since it was dated June 24, 1983, and presumably mailed shortly thereafter. As is provided in 7 CFR 46.41, a licensee is charged with acts, omissions or failures of any of its employees to carry out responsibilities under the Act. Despite this regulatory requirement the fact that an invoice was received by respondent which reflected that complainant believed it was the seller of goods to respondent is not dispositive of the issue in this case. An invoice is only evidentiary as to the fact there was a transaction in which both parties were involved. See *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972). When, as here, there are two invoices, more would be needed to prove that respondent acted improperly. Complainant sought to bolster its proof with an argument that since it

gave Sureway a two dollar allowance as a result of market decline, from which allowance respondent benefitted, it was clear that respondent should have known that complainant was the actual seller. We cannot agree with complainant in this regard because there is no showing that respondent ever knew of the existence of complainant other than as a result of the invoice sent to it, which presumably was received after the allowance was granted. The complainant further argues that Sureway was indicated as broker on its invoice, and therefore, that respondent was on notice that complainant was the actual seller. In and of itself, this is not sufficient to cause respondent to assume other than as it did. Neither are we impressed by the fact that the bill of lading showed Dobler as the shipper since it is common in the perishable agricultural commodities industry for an intermediary to buy the produce from a seller, and have it shipped directly to the buyer.

We are more impressed by the evidence and the arguments submitted by respondent in defense of its actions. First, Sureway never issued a broker's memorandum of sale. Its failure to do so should have put complainant on notice shortly after the transaction that something was amiss, thereby causing it to take immediate action to notify both Sureway and respondent in strong terms as to its interest in the transaction. Complainant chose not to do so for reasons which are unexplained. In addition, respondent received an undated invoice from Sureway which showed that the date of shipment was June 20, 1983, which did not mention the name of complainant, and which asked for remittance to Sureway within seven days. Presumably this invoice reached respondent no later than the time the invoice from complainant was received. In addition, Mr. John R. Tramutola, the president of respondent, stated in an affidavit that Sureway told him it had a load of lettuce to sell for Sureway's account. Respondent was entitled to rely upon such an assertion as indicating that Sureway was the seller. Furthermore, an employee of Sureway stated in an affidavit that Sureway was the purchaser, and that he told respondent this. He also stated that Sureway dealt with Dobler in other transactions, and that 90 percent of the time it purchased the commodities from Dobler. When it did not, he said that it issued a broker's memorandum of sale. Complainant never controverted the statement made by Mr. Tramutola, or those made by an employee of Sureway.

In view of the above we have no choice but to conclude that complainant has not carried its burden of proof. The only strong argument that complainant made was that since respondent received its invoice prior to making payment to Sureway, it was on notice that there was a problem, and had a duty to ascertain the true

facts. We cannot agree in this regard. Mere receipt of an invoice is not sufficient to place such an obligation on respondent. See *Farmer's Sales of Texas, Inc. v. Food Town Stores, Inc.*, 41 Agric. Dec. 2268 (1982). Therefore, the complaint in this proceeding should be dismissed.

ORDER

The complaint in this proceeding is dismissed.

WALTERS PRODUCE, INC., v. FRANCES PRODUCE CO. PACA Docket No. 2-6025. Decided January 10, 1985.

Wrongful rejection—Repudiation of acceptance constituting rescission—

Repudiation of rescission based on incomplete information—Dismissal.

Where respondent wrongfully rejected a shipment of potatoes and complainant accepted the rejection, a rescission of the original contract was created. Complainant's decision to rescind was found to be binding, even though it was based on incomplete information as to the lapse of time prior to inspection of the shipment, and the fact that only a portion of the shipment was inspected. Absent fraud, misstatement of facts, or willful withholding of information by a receiver, a seller may not repudiate its decision. Complainant's claim based on wrongful rejection by respondent is dismissed.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

A Decision and Order was entered in this proceeding on September 15, 1983, in which it was determined that respondent had failed to pay complainant \$15,746.94 with respect to a carload of potatoes shipped in interstate commerce. On September 27, 1983, respondent filed a Petition for Reconsideration. It claimed that the conclusion that complainant was entitled to repudiate its acceptance of respondent's rejection of the potatoes was incorrect, and that the conclusion a restricted inspection of the potatoes was insufficient to show the condition of the entire load was in error. Complainant was given an opportunity to reply to the Petition for Reconsideration, and did so on November 28, 1983. After reviewing all pertinent information, we have concluded that the original decision in this proceeding was incorrect, and that under the factual circumstances involved herein complainant did not properly repudiate its acceptance of the rejection of the load. As a result respondent has

not violated Section 2 of the Act. As will be discussed below, the counterclaim must also be dismissed. Since we are revising our original decision, we are issuing a new order.

FINDINGS OF FACT

1. Complainant, Walters Produce, Inc., is a corporation with a business address of P.O. Box 36, Newdale, Idaho. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Francis Produce Company, is a partnership composed of Anthony G. Francis and Joseph G. Francis, with a business address of 3048 White Horse Road, Greenville, South Carolina. At the time of the transaction involved herein respondent was licensed under the Act.

3. On June 2, 1981, complainant sold to respondent a carload of U.S. No. 1 potatoes, f.o.b. The carload contained 1,100 bales, each bale containing 10 five lb. bags at a contract price of \$16.50 per hundredweight, for a total price of \$9,075.00. In addition the carload contained 1,100 bales, each bale containing five 10 lb. bags at a contract price at \$14.50 per hundredweight for a total price of \$7,975.00. Complainant paid the freight for shipment in the total amount of \$5,105.63, bringing the total price to be received from respondent under the contract to \$22,155.63.

4. On or about June 2, 1981 the potatoes were subjected to a shipping point inspection, where they were found to grade U.S. No. 1. On June 3, 1981, the potatoes were shipped from Idaho to Greenville, South Carolina, where they were placed at respondent's warehouse at 10:30 a.m. on June 9, 1981. At about 10:00 a.m. on June 10, 1981 respondent was notified by the railroad that the potatoe had been placed. Respondent began to unload the car at 7:00 a.m. on June 11, 1981, and found rotten potatoes at the door.

5. Upon finding rotten potatoes at the door respondent immediately sought to secure a federal inspection, but could not reach anyone at the inspector's office on June 11, 1981. Respondent did not notify complainant that it was rejecting the potatoes or that it had sought a federal inspection, but could not get it. On June 12, 1981, respondent secured a federal inspection. Such inspection showed in pertinent part as follows:

Products Inspected:	LONG RUSSET POTATOES in mesh printed "Newdale Brand Idaho Potatoes, U.S. NO 1, Packed in Idaho, Walters Produce, Inc., Newdale, Idaho 83436, Produce of U.S.A., Grown in Idaho, 5 Lbs. or 10 Lbs New Wt.," placed in paper bags printed "Newdale Brand Idaho Potatoes, U.S. NO. 1, Packed in Idaho By H. Schwendiman, Newdale, Idaho, Produce of U.S.A, Contents 5-10 Lb Bags or 10-5 Lb. Bags." Manifested as 2200 Master Bags
Condition of Load	Throughload, 4 or 5 Rows, 14 or 15 Layers. Quality Mature, fairly clean, fairly bright to bright, fairly well to well shaped. Grade defects average 2% old shatter bruises, growth cracks and misshappen.
Condition	Generally firm. In many samples none, in most of samples, range from 2 to 4%, average 2% damage by dry type Fusarium Tuber Rot. In 30% of samples none, in 70% of samples 5 to 7%, average 4% bacterial Soft Rot in various stages
Grade	Meets quality requirements but fails to grade U.S. NO 1 2 inch or 4 Oz. minimum only account condition.
Remarks:	Inspection and certificate restricted to portion of load between door and upper 2 layers of 2 Stacks each side of door. This certificate supersedes certificate NO E 172865.

6. Respondent, having failed to notify complainant either that it was rejecting the load within 24 hours of being notified by the railway that the carload had been placed, or that it was seeking but had failed to secure a federal inspection within that time, accepted the produce.

7. Complainant was notified that respondent had rejected the load of potatoes on June 12, 1981, by the broker in this matter, Hubert H. Nall Company, Inc., Forest Park, Georgia. Initially complainant accepted respondent's rejection, and sought to have the potatoes handled for its account by respondent. Respondent de-

clined to do so. Complainant found an alternative receiver, Brand Brothers, to handle the potatoes for complainant's account. Subsequently, complainant discovered that the potatoes had not been inspected until three days after they arrived and notified respondent that it repudiated the prior rejection of the potatoes.

8. Brand Brothers handled the potatoes for complainant's account, and remitted to it \$6,408.69.

9. A formal complainant was filed on February 9, 1982, which was within nine months from the time of the cause of action involved herein arose. A timely counterclaim was filed by the respondent on May 7, 1982.

CONCLUSIONS

This proceeding arises as a result of a series of events which led to a carload of potatoes being wrongfully rejected by respondent because it misunderstood its obligations under the PACA regulations. In this case the parties entered a contract for the sale and delivery, f.o.b., of a carload of potatoes consisting of 1,100 bales, each such bale containing 10 five pound bags, at \$16.50 per hundredweight, and also 1,100 bales consisting of five 10 pound bags at \$14.50 per hundredweight, for a total contract price of \$17,050.00. In addition, complainant paid the freight for the benefit of respondent in the amount of \$5,105.63, for a total obligation by respondent to complainant of \$22,155.63. The evidence is clear that complainant loaded the potatoes aboard a railroad car, but at the end of the loading cycle put potatoes from a bin of low quality potatoes near the door of the car. Thereafter, respondent, when it began to unload the railroad car, noticed that the potatoes near the door appeared not to be U.S. No. 1. It immediately sought inspection by a federal inspector, but could not attain it in a timely fashion. When it did so, it only had a small portion of the total load of potatoes inspected. Respondent's delay in notifying complainant that it wished to reject the load, and the fact that it had a partial inspection which cannot be said to reflect the condition of the entire load, would normally be fatal to its defense and counterclaim. However, because complainant accepted the rejection of respondent, and in effect its rescission of the contract, we must determine which party should prevail.

The pertinent times and dates during which these matters occurred begin with the arrival of the railroad car and its placement at respondent's siding on March 9, 1981 at 10:30 a.m. It was not until a day later, probably around 10:00 a.m., that the railroad notified respondent that the car had been placed. Pursuant to 7 CFR 46.2(bb)(2) a receiver rejects produce without reasonable cause

when it fails to advise "the seller, shipper, or his agent that produce, complying with the contract will not be accepted." Pursuant to 47 CFR 46.2(cc) "reasonable time" is "(2) For fresh fruits and vegetables with respect to rail shipments, not to exceed 24 hours after notice of arrival and the car has been placed in a location where the produce is made accessible for inspection. . . ." In this case respondent was notified that the car had been placed in a location where the product was accessible for inspection or unloading at about 10:00 a.m. on June 10, 1981. As is stated in 7 CFR 46.2(dd)(3) acceptance is "Failure of the consignee to give notice of rejection to the consignor within a reasonable time as defined in paragraph (cc) of this section." Therefore, respondent had an obligation, if it were going to reject the produce, to notify complainant of its intention to do so no later than 10:00 a.m. on June 11, 1981. The evidence in this case is clear that respondent did not give notice to complainant of its intention to reject the goods until June 12, 1981, when it did so through the broker, Hubert H. Nall Company.

Initially complainant accepted a rescission of the contract on the part of respondent when it was notified of the results of the June 12, 1981, inspection. However, complainant attempted to repudiate this rescission shortly thereafter when it learned that the railroad car had been placed at respondent's place of business on June 9, 1981, with a three day lapse prior to inspection.

Our original decision, in favor of complainant, was based on two considerations. First, we found that at the time complainant accepted respondent's rejection of the load, it did not have all the pertinent facts available to it. Second, respondent did not notify complainant of its rejection of the goods in a timely fashion as required by 47 CFR 46.2(bb) and (cc). However, on reconsideration, we find that respondent should prevail. In making this redetermination, we must reconcile two conflicting principles which have been established under the Perishable Agricultural Commodities Act.

There were two facts essential to the rejection of the carload of potatoes which were not conveyed to complainant, and which if they were, would probably have caused complainant to decline to agree to the rejection of the carload by respondent. We draw this conclusion because as soon as complainant learned of these facts it attempted to reverse itself. First, the inspection upon which respondent relied occurred more than 24 hours after the railroad notified respondent that the car had been placed for its use, and the applicable regulations required that the receiver either notify the shipper that it was rejecting the load within 24 hours of such notification, or that it was seeking but had failed to secure a federal

inspection within that time. Having failed to do so, respondent is deemed by operation of law to have accepted the produce.

The fact that respondent could not receive an inspection within 24 hours of the time it was notified that the railroad car had been placed does not aid it with respect to this rule, 7 CFR 46.2(cc)(3) states in pertinent part that "If, within the applicable period, the receiver . . . applies for but cannot obtain Federal inspection before the end of this period, (i.e., 24 hours) and so notifies the consignor within the applicable period, the period shall be extended until . . . Federal inspection is made. . . ." Respondent, having been notified that the car was placed on June 10, 1981, at about 10:00 a.m., and not having had the goods inspected until June 12, 1981, with notification to complainant occurring at 11:00 a.m. on that date, allowed too much time to lapse to take advantage of this rule.

Second, the inspection which was made two days after the carload arrived at respondent's place of business was of only 200 master bags out of 2,200 master bags of potatoes. Respondent argued that an inspection of a small portion of a total load of a commodity has frequently been accepted by the Department of Agriculture as reflecting the condition of the entire load. However, the cases cited by respondent in this regard to support its argument appear to involve factual circumstances in which there was no real issue raised as to whether an inspection of part of the load showed the condition of the entire load. Where, as here, the facts clearly manifest that the portion of the load nearest the door of the railway car was of poorer quality than the rest of the potatoes, and it was this area of the car that was inspected, it follows, *ex necessitate*, that the inspection could not reflect the condition of the entire load. Indeed, a subsequent inspection of 600 master bags of the load of potatoes showed that those 600 bags made good delivery as U.S. No. 1 potatoes.¹ The proper rule to apply with respect to a restricted inspection when the inspection is challenged as not being of a sufficient portion of the load to show its overall condition, or when it is obvious on the facts of the case that such inspection is not adequate, is that the restricted inspection does not reflect the condition of the entire load. See *Mario Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. (1970); *Tom Bengard Ranch v. Tomatoe*.

¹ The 600 master bags inspected at that time are, for the purposes of the record, however, insufficient to show the condition of the entire load of potatoes for the same reasons that the restricted inspection of the potatoes near the door on June 12, 1981, was insufficient.

Inc., 41 Agric. Dec. 1637 (1982). Therefore, we conclude that respondent did not prove the load did not make good delivery.

Once it learned the above facts complainant immediately sought to repudiate its rescission. The controlling issue is whether it may do so under circumstances in which there has been no showing that respondent deliberately withheld information.

Respondent has relied on the holding in *Admiral Packing Co. v. Prevor-Mayrsohn International, Inc.*, 41 Agric. Dec. 99 (1982), in arguing that complainant must bear the risk of its mistake in agreeing to the rescission under the factual circumstances involved because respondent did not intentionally mislead it. The important facts in *Admiral Packing Co.* are very similar to those involved in this proceeding. In that case a truckload of lettuce was left at respondent's place of business for 30 hours before a federal inspection was secured. The applicable regulation provided that a truckload would be deemed accepted if it were held more than eight hours. After 30 hours had elapsed an inspection revealed that the lettuce did not make good delivery. Respondent then rejected the load. The broker conveyed this information to the complainant, but did not tell it when the truck arrived, or that the inspection was restricted. Complainant agreed to the rejection of the goods. In finding for respondent this tribunal stated:

However, there is nothing in the record to show that this was the fault of respondent. That is, the record does not show that respondent actually misstated the facts or willfully withheld the information available to it. In the absence of fraud on the part of respondent, complainant's mistaken ideas about the transaction are its own responsibility. It appears that complainant has no one but itself to blame for its hasty acceptance of the return of the commodity.

In *Tom Bengard Ranch, Inc. v. Tomatoes Inc.*, *supra*, on the other hand, the Department ruled that a restricted inspection of 300 cartons out of 700 cartons of lettuce which was shipped in interstate commerce was an essential fact that the shipper was entitled to know when confronted with the receiver's assertion as to the condition of the lettuce. In that case the shipper had authorized the receiver to handle the lettuce on consignment based on its lack of information as to the extent of the inspection. We held that "the failure of respondent to accurately inform complainant of the actual number of cartons inspected constitutes a material misrepresentation of fact upon which complainant relied, and allows complainant to rescind its consignment agreement.", *Id.* at 1639. Thus, the two

rulings by this Department appear to be inconsistent with each other.

Upon a thorough reconsideration of the above two vying principles we have concluded that the better rule is that the shipper is responsible to ask all necessary questions to get the facts it needs to determine whether to accept adverse action by a receiver. Absent fraud on the part of a receiver, a misstatement of the facts, or the wilful withholding of information on the receiver's part, the seller may not repudiate its decision when it learns of other facts.

In reaching this conclusion we take notice of the fact that in *Admiral Packing Co., supra*, reference was made to Section 154 of The Restatement of Contracts, 2nd. Edition (1979), which states as follows:

A party bears the risk of a mistake when

* * * * *

(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient. . . .

We believe, upon reconsideration, that, in circumstances such as those which occurred here, it is appropriate to state that the shipper made a decision based on only a limited knowledge about the facts which were material to its interests, but which it treated as sufficient.

It is also possible to reach the same conclusion we have reached above without dealing with the concept of "mistake" under the Restatement of Contracts. Section 161 of the Restatement deals with "When Non-Disclosure Is Equivalent to an Assertion." It states in pertinent part as follows:

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

(a) where he knows that disclosure of the facts is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

(b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which the party is making the contract and if non-disclosure of the fact

amounts to a failure to an act in good faith and in accordance with reasonable standards of fair dealing.

(c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidence in or embodying an agreement in whole or in part.

(d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

There is no showing that any of these circumstances exist in this proceeding.

In view of the above we find that the contract was rescinded, as a result of which the complaint must be dismissed. Since respondent was willing to rescind the contract, and complainant agreed, respondent is bound by that agreement. Therefore, its counterclaim must be dismissed. In any event we would find respondent's proof of damages too remote for consideration. A mere reference to the Market News Report for Atlanta, Georgia in its brief is not sufficient to show that it was damaged.

ORDER

The complaint is dismissed.

The counterclaim is dismissed.

LINDEMANN FARMS, INC., v. INTERNATIONAL A.G., INC. PACA
Docket No. 2-6172. Decided January 10, 1985.

Breach of contract—Change of contract terms—Price after sale basis—
Commission not allowed—Reparation awarded.

George S. Whitten, Presiding Officer.

Matthew M McInerney, Newport Beach, California, for complainant

C Peter Buhler, Miami, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$12,954.80, in connection with the sale in interstate commerce of three railway carloads of cantaloupes.

A copy of the report of investigation was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complaint.

The amount claimed in the formal complaint does not exceed \$15,000, and therefore the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. The parties were given an opportunity to submit further evidence in the form of sworn statements and to file briefs. Complainant filed an opening statement and respondent filed an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Lindemann Farms, Inc., is a corporation whose address is P.O. Box 1383, Los Banos, California.

2. Respondent, International A.G., Inc., is a corporation whose address is 1930 N.W. 23rd Street, Miami, Florida. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about September 12, 1981, complainant sold to respondent one railway carload, No. SPFE 457198, containing 1,722 Lindy's Delight Brand cantaloupes, size 18, at \$5.00 per carton, or \$8,610.00, plus \$1,377.60 for cooling and palletizing, \$22.50 for a temperature recorder, and \$258.30 for brokerage, or a total price of \$10,268.40, f.o.b. On September 12, 1981, between the hours of 10:15 a.m. and 2:20 p.m. the cantaloupes were federally inspected while on car SPFE 457198 and found to grade U.S. No. 1 with no decay. The inspection report additionally stated "Mature, mostly hard, many firm. Well netted, good internal quality. Defects average within tolerance. Meets Canadian import requirements."

4. Complainant shipped the cantaloupes in car SPFE 457198 from Los Banos, California, to respondent in Miami, Florida, on September 12, 1981. The car arrived in Miami on Monday, September 21, 1981, and was spotted at respondent's warehouse at 5:00 p.m. on the same day. Respondent's business hours are from 4:00 a.m. to 11:00 a.m. Early on the following day respondent opened the car and called for a railroad and federal inspection. On September 23, 1981, at 11:00 a.m., a portion of the cantaloupes on the car were federally inspected with the following results in relevant part:

CAR NO.: SPFE 457198

KIND: Mech. Refr.

WHERE INSPECTED: Applicant's siding

Condition of Equipment: Temperature Control Unit In Operation.

Products Inspected: CANTALOUPS in cartons branded "Lindy's Delight Westside Melons, Cantaloupes Packed & Shipped by Lindemann Farms, Inc. Lodi, California." Taped "18" Count. APPLICANT STATES: 1722 Cartons.

Condition of Load: Through 2 rows 7 layers 3 pallets. Load shifted lengthwise from 1 inch in bottom layer to 9 to 15 inches in top layer toward "A" end of car with most bottom layer cartons moderately to severely creased.

Condition of Pack: Tight.

Temperature of Product: Various Locations: 34°F to 36°F.

Condition: Mostly ripe, and firm, some firm. Ground color mostly yellow, some turning. Generally 1 to 8 melons per carton, none in few, average 13% damage by bruising scattered throughout the pack affecting ripe and firm melons. 1 to 8 decayed melons in most cartons, none in some, average 17% Cladosporium Rot affecting stem scars, and/or Bacterial Soft Rot affecting the walls, Both decays are in various stages.

Remarks: Inspection and certificate restricted to product and lading in approximately 900 cartons being unloaded at time of inspection.

On September 24, 1981, the car was inspected by a railroad inspector who made the following remarks in relevant part:

Note load shifted in B End of car—(See photos.) Note 6 pallets in doorway area (*illegible*) up-over half of entire load leaning in car—Car in process of unloading at time of inspection—Shipper did not use Bulkheads to Brace Load.

5. On or about September 16, 1981, complainant sold to respondent one carload No. SPFE 457387, consisting of 1,722 cartons of Lindy's Delight brand cantaloupes, size 18, at \$5.00 per carton, or \$8,610.00, plus \$1,377.60 for cooling and palletizing, \$22.50 for a temperature recorder, and \$258.30 for brokerage, or a total of \$10,268.40, f.o.b. On September 16, 1981, between the hours of 10:30 a.m. and 3:30 p.m., the cantaloupes in car SPFE 457387 were federally inspected and found to grade U.S. Commercial, with no decay. The inspection also stated: "Mature, mostly firm, some hard.

Mostly well, some fairly well netted. Defects average within tolerance. Meets Canadian import requirements."

6. On September 16, 1981, complainant shipped the cantaloupes from Los Banos, California, to respondent in Miami, Florida. The car arrived in Miami on Saturday, September 26, and was spotted at respondent's unloading platform at 11:00 a.m. Late on the morning of Monday, September 28, the car was opened and a federal inspection was called for. On September 28, 1981, at 12:45 p.m., a portion of the cantaloupes in car SPFE 45738 was federally inspected with the following results in relevant part:

CAR NO.: SPFE 457387

KIND: Mech. Refr.

WHERE INSPECTED: Applicant's Siding

Condition of Equipment: Temperature Control Unit In Operation.

Products Inspected: CANTALOUPS in cartons branded "Lindy's Delight Westside Melons, Packed & Shipped by Lindemann Farms Inc. Los Banos, California" taped "18".
APPLICANT STATES: 1722 Cartons.

Condition of Load: Through 2 row 7 layers 3 pallets. Most pallets from center of car are shifted lengthwise from 2 inches in second layer to 15 inches in top layer toward "A" end wall with most bottom layer cartons slightly to moderately creased.

Con. of Pack: Tight.

Temperature of Product: Various Locations 38°F to 40°F.

Condition: Mostly ripe and firm, some firm. Mostly yellow, some turning. 1 to 3 decayed melons in most cartons, none in many, average 8% Cladosporium Rot affecting stem scars and Bacterial Soft Rot affecting walls. Both decays are in various stages. Most stem scars show light deposits of gray surface mold not affecting grade.

Remarks: Inspection and certificate restricted to product and lading in approximately 60 cartons being unloaded at time of inspection and remaining upper 2 layers of load. Surface mold reported at applicant's request.

On September 29, 1981, at 10:00 a.m., the cantaloupes in car SPFE 457387 were again subjected to federal inspection with the following results in relevant part:

CAR NO.: SPFE 457387

KIND: Mech. Refr.

WHERE INSPECTED: Applicant's Siding

Condition of Equipment: Temperature Control Unit In Operation.

Products Inspected: CANTALOUPS in cartons branded "Lindy's Delight, Westside Melons, Packed & Shipped by Lindemann Farms Inc. Los Banos, California" taped "18". APPLICANT STATES: Approximately 1500 Cartons Remaining.

Condition of Load: Car partly unloaded: Lengthwise load 2 rows 7 layers 3 pallets. Most pallets from center of car are shifted lengthwise from 2 inches in second layer to 15 inches in top layer toward "A" end wall with most bottom layer cartons slightly to moderately creased.

Con. of Pack: Tight.

Temp.: Various Locations 38°F to 40°F.

Condition: Mostly ripe and firm, some firm. Average 3% soft melons. Mostly yellow, some turning. Average 3% damage by bruising, found in mostly bottom layer cartons. 1 to 4 decayed melons in most cartons, none in many, average 8% Cladosporium Rot affecting stem scars and/or Bacterial Soft Rot affecting walls. Both decays are in various stages. Most stem scars show light deposits of gray surface mold not affecting grade.

Remarks: Inspection made during process of unloading. Surface mold reported at applicant's request.

On October 15, 1981, at 2:00 p.m., a third federal inspection was made of cantaloupes at respondent's warehouse with the following results in relevant part:

Products Inspected: CANTALOUPS in cartons branded "Lindy's Delight, Quality Cantaloupes, Packed & Shipped by Lindemann Farms Inc., Los Banos, California. Taped "18". APPLICANT STATES: Approximately 1200 Cartons remaining.

Condition of Load: Stacked at above location.

Condition of Pack: Tight.

Temperature of Product: 38°F to 40°F.

Condition: 4 to 18 decayed melons per carton, average 51% Clado sporium Rot in various stages affecting the stems scars and/or Bacterial Soft Rot in various stages affecting walls. Remainder of stock: Ripe and firm. Yellow ground color.

Remarks: Above lot previously inspected on September 28, 1981 and reported on federal certificate number E162643. Records show stock unloaded from SPFE 457387.

On October 7, 1981, a federal dump certificate was issued covering 825 cartons of cantaloupes identified as "Lindy's Delight, Quality Cantaloupes, Packed & Shipped by Lindemann Farms Inc., Los Banos, California, "Taped "18". The certificate stated that the cantaloupes were "85 to 100% decayed. Decay is Cladosporium Rot and/or Bacterial Soft Rot in various stages affecting stem scars and/or walls. . . . Applicant states unloaded on September 29, 1981 from car number SPFE 457387. Temperature: 42°F-45°F."

7. On or about September 22, 1981, complainant sold to respondent, one railway carload containing 1722 Lindy's Delight brand cantaloupes, size 22, at \$3.50 per carton or \$6,027.00, plus \$1,377.60 for cooling and palletizing, \$22.50 for a temperature recorder, and \$258.30 for brokerage, or a total price of \$7,685.40, f.o.b. Between the hours of 4:00 p.m. on September 19, and 2:30 p.m. September 21, 1981, the cantaloupes were federally inspected while on car SPFE 456057 at shipping point and found to grade U.S. Commercial with no decay. The inspection report additionally stated "Mature, generally firm. Mostly well, some fairly well netted. Defects average within tolerance. Meets Canadian import requirements."

8. Complainant shipped the cantaloupes in car SPFE 456057 from Los Banos, California, to respondent in Miami, Florida, on September 22, 1981. The car arrived in Miami at 11:00 a.m., Wednesday, September 30, and was spotted at respondent's place of business at 5:20 p.m. on that day. On Thursday, October 1, in the early morning it was noted that the car was spotted in a position so that the doors could not be opened. Respondent notified the railroad and the car was respotted on the following day and unloading was then begun. Respondent noted condition problems during unloading and called for a federal inspection. On Saturday, October 3, 1981, at 6:50 a.m., the car was federally inspected with the following results in relevant part:

CAR NO.: SPFE 456057

KIND: Mech. Refr.

WHERE INSPECTED: Applicant's Siding

Condition of Equipment: Temperature Control Unit In Operation.

Products Inspected: CANTALOUPS in cartons branded "Lindy's Delight, Packed & Shipped by Lindemann Farms Inc. Los Banos California" taped "22". APPLICANT STATES: Approximately 500 Cartons "A" end, Approximately 700 Cartons "B" end.

Condition of Load: Car partly unloaded: Crosswise 2 rows 7 layers 1 to 3 pallets.

Condition of Pack: Each Lot: Tight.

Temperature of Product: Various Locations: Each Lot: 36°F to 38°F.

Condition: Each Lot: Ground color mostly turning, some light green, few yellow. Mostly firm, some ripe and firm. "B" end Lot: Average 4% soft melons. Average 3% damage by sunken areas. 1 to 4 decayed melons in most cartons, none in some, average 8% Bacterial Soft Rot and/or Fusarium Rot in various stages affecting walls. Some melons have light to moderate deposits of gray surface Mold not affecting grade. "A" end Lot: No decay.

Remarks: Inspection made during process of unloading. Ends of cars segregated and amount of surface mold reported at applicant's request.

On October 28, 1981, a federal dump certificate was issued on the application of respondent covering 786 cartons of cantaloupes identified as "Lindy's Delight, Packed & Shipped by Lindemann Farms, Inc. Los Banos, California." Taped 22." The certificate stated that the produce was found to be: "100% decayed. Decay is Cladosporium Rot and/or Bacterial Soft Rot in various stages affecting stem scars and walls." It was further stated: "Applicant states stock unloaded on October 3, 1981 from car number SPFE 456057. Temperatures: 42°F to 43°F."

9. Following the initial inspection on each car respondent advised complainant, through the broker, of the results of the initial federal inspection as reflected in the inspection reports quoted above. The parties then agreed that respondent should handle the cantaloupes on a price after sale basis.

10. Respondent has paid complainant a total of \$15,267.90.

11. The informal complaint was filed on November 30, 1981, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant claims in its brief that "it was upon verbal representation of the results of the inspection along with the fact that the inspection dates coincided with arrival dates that complainant authorized the handling of these three cars for their account." Complainant contends that since the modification of the original contract resulted from a misrepresentation on the part of respondent, the modification should be voided. However, complainant's sales manager, Scott Brooks, stated in his opening statement as follows:

As I recall, we were assured that the cars upon arrival were promptly handled, viewed and subsequently inspected to ascertain the most prompt and available evidence as to the condition quality of the melons at time of arrival. It was our understanding and it was implied to our Lindemann Farms office that inspections on all three cars in question were performed on the day the cars arrived at International A.G. Being assured of this fact, our office authorized the handling of all three cars for our account.

Although Mr. Brooks claims that he "was directly involved in authorizing settlement adjustments on any disputed loads that might arise during the season", the record reveals that the actual person who negotiated the sales and modifications relative to the cantaloupes was a Mr. John Fraley. In view of the less than definite allegations by Mr. Brooks quoted above we conclude that all that the record in this case will support is the conclusion that respondent failed to convey to complainant the arrival dates on each of the cars at the time when respondent reported the results of the inspections to complainant. However, we have held that a receiver's failure to disclose truly material information which is known to such a receiver will result in rendering a modification agreement voidable at the election of the other party. See *Pappas & Co. v. A. & J. Produce Corp.*, 41 Agri. Dec. 1820 (1982) and *Tom Bengard Ranch v. Tomatoes, Inc.*, 41 Agric. Dec. 1637 (1982); see also, *Th Garin Co. v. New England Farms*, 41 Agric. Dec. 337 (1982). Accordingly, the relevant inquiry in this case is whether respondent's failure to disclose the arrival dates on the cars was a failure to disclose information which was material to complainant's decision to enter into the contractual modification. In order to determine the

answer to this question it will be necessary to assess the data on each car individually.

The carload of cantaloupes shipped on September 12, arrived in Miami on Monday, September 21, and was spotted at respondent's warehouse at 5:00 p.m. on that date. The federal inspection was made at 11:00 a.m. on September 23, or some 42 hours after the car was spotted at respondent's warehouse. This is less than two days following the time when the car was made accessible for inspection, and cannot be considered an inordinate delay. In addition, although the inspection was restricted to 900 cartons, such inspection discloses a total of 30% average condition defects. This means that if the remaining cartons on the car, which were not inspected, are assumed to have had no decay, the car as a whole would still have had an average of over 15½% condition defects, almost nine percent of which would have been decay. In addition, inspection by a railroad inspector disclosed that the load had shifted, and that such shifting was due to the shipper's failure to brace the load by using bulkheads. Accordingly, the bruising present in the cantaloupes can be attributed to complainant. In view of all of these factors, we think it can fairly be said that the inspection was clearly indicative of a breach of contract on the part of complainant, even taking into consideration the approximately two day lapse of time between arrival and inspection. Therefore, respondent could reasonably have viewed the arrival time vis-a-vis the inspection time as insignificant. We find that respondent did not withhold material information from complainant relative to the carload of cantaloupes shipped on September 12.

The carload of cantaloupes shipped on September 16, presents us with a similar situation. When looking at the inspections on this car it should be kept in mind that the parties nowhere in the record specify the exact time following the arrival inspection or inspections when respondent notified complainant of apparent trouble. Also, it should be kept in mind that nowhere does complainant claim that respondent reported the inspections inaccurately or inadequately. Therefore, we assume that respondent reported trouble on car number SPFE 457387 to complainant following the inspection which was made on September 28, at 12:45 p.m., and that, although this inspection was of a very limited quantity of cantaloupes, complainant took this factor into consideration when entering into the modification agreement, and assumed that the restricted inspection was indicative of the condition of the entire load, as later inspection on September 29, covering 1500 cartons proved it to be.

The load of cantaloupes shipped on September 16, arrived in Miami on Saturday, September 26, and was spotted at respondent's warehouse at 11:00 a.m. on that day. The federal inspection of September 28, at 12:45 p.m. was thus two days, one and three quarter hours, after the car arrived and was made accessible for inspection. The inspection shows that the cantaloupes contained an average of 8% decay which is well in excess of what would be allowed for good delivery. The two day delay between arrival and inspection, considering the temperatures shown by the inspection, would not preclude our finding that this carload of cantaloupes failed to make good delivery. Accordingly, we again conclude that respondent could reasonably have viewed the arrival time vis-a-vis the inspection time for this carload of cantaloupes as relatively insignificant. We find that respondent did not withhold material information from complainant relative to this carload of cantaloupes.

The third and final carload of cantaloupes arrived in Miami on September 30, and was spotted at 5:20 p.m. on that day. However, early on the morning of October 1, respondent discovered that the car had been improperly spotted by the railroad in such a manner that the door of the car was obstructed by a partition between the two unloading bays of respondent's warehouse. No unloading could be performed until the railroad company respotted the car. Respondent notified the railroad company as soon as it detected the problem, and the car was respotted by the railroad the following day, October 2. When respondent opened the car on October 2, it discovered problems in the car, and called for a federal inspection. The federal inspection on this car was performed the following day October 3, 1981, at 6:50 a.m. In defining the term "reasonable time" as used in paragraph (bb) and (cc) of section 46.2 of the Regulations (7 CFR 46.2(bb) & (cc)), the period of time within which rejections generally may be made is stated to commence "after notice of arrival and the car has been placed in a location where the produce is made accessible for inspection". The subject car was not made accessible for inspection until it was respotted on October 2, or approximately 24 hours or less prior to the time of inspection. We do not believe that this amount of delay is out of the ordinary, and would constitute information which would be material to complainant's decision to enter into a modification of the contract. Accordingly, we find no basis for voiding the modification as to the third car.

The next question concerns the nature of the modification agreed to by the parties. Complainant states that the parties agreed to the produce being handled on a consignment basis for the account of complainant. Respondent, however, states that the agreement was

for the produce to be handled on a "price after sale" basis. While the issue is a close one, we find that the record, on balance, supports respondent's position. Included in the report of investigation are notes made by the broker at the time of the modification as to one of the cars. The note states "Called John & Scott, Sept 23, 1981—2:45 p.m. Told to let A.G. handle car, price after sale—" We conclude that the modification called for the produce to be handled by respondent and, subsequent to the resale of the cantaloupes, for the parties to agree on a price in the light of the proceeds realized from the resale.

The parties did not get together after the resale of the cantaloupes to agree on a price. Instead, respondent simply remitted to complainant amounts which respondent felt were reasonable. Accordingly, it is appropriate that we should try to ascertain, if possible, on the basis of the record before us an appropriate price for the cantaloupes. An investigator from this Department personally investigated the records of respondent relative to the cantaloupes at the request of complainant. The report resulting from this personal investigation was included as an exhibit to the Department's report of investigation. The investigator disclosed that respondent in reselling the subject cantaloupes failed to assign lot numbers so as to segregate the sales of complainant's produce from that of the resale of other cantaloupes on hand during the period in question. Since a price after sale contract contemplates that the parties will agree to a price subsequent to the resale of the commodity, such terms envisage accurate information about the proceeds of the resale as a basis on which to negotiate the price after sale. Consequently, we find that respondent's failure to keep adequate records, so as to disclose accurately the proceeds of the resale of complainant's three shipments of cantaloupes, was a breach of the "price after sale" agreement.

The difficulty in assessing damages in regard to a breach of this nature centers in the fact that respondent has by the breach destroyed the only data which can form an accurate basis for the assessment of damages. The Department's investigator looked at the total sales of cantaloupes by respondent during the period in question, and compiled a constructed accounting for each of the three arloads of cantaloupes. This accounting was, of necessity, based upon the commingling of complainant's cantaloupes with cantaloupes from other shippers. However, there is no indication that the cantaloupes from other shippers were of inferior quality, and accordingly the investigator's method of constructing an accounting should favor the complainant. This is true because the basis for complainant entering into the modification was the poor condition

of the cantaloupes shipped by complainant. The Department's investigator, on the basis of the constructed accounting, determined that respondent had underpaid complainant as to two cars, and overpaid complainant as to the remaining car. The net result, as computed by the Department's investigator, was an overpayment in the amount of \$300.59. However, the Department's investigator allowed a commission to respondent on each of the carloads in the amount of 13%. Since we have found that the modification called for a "price after sale" instead of a consignment agreement, and since respondent breached the modification agreement, we do not feel that the 13% commission should be allowed. The total of the 13% commissions on the three cars amounted to \$4,053.40. After deducting the computed overpayment of \$300.59 from this amount we are left with a figure of \$3,752.81 which we find to be the reasonable amount which respondent should pay to complainant (in addition to the amounts already paid) under the "price after sale" agreement. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$3,752.81, with interest thereon at the rate of 13% per annum from November 1, 1981, until paid.

CHARLES W. GIBSON, DON M. JOHNSTON, and GERALD A. JOHNSTON
d/b/a JOHNSTON-GIBSON SALES COMPANY v. FELDMAN BROTHERS
PRODUCE, INC. PACA Docket No. 2-6249. Decided January 10,
1985.

Wrongful rejection—Damages.

Where respondent wrongfully rejected a shipment of potatoes, relying on the less favorable of two separate inspections, he is liable to the complainant. Damages are measured as the difference between contract price and the proceeds of the resale.

Andrew Y. Stanton, Presiding Officer

Thomas P. Oliveri, Newport Beach, California, for complainant

Leroy W. Grudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,617.00 in connection with the sale of a carload of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statement as well as briefs. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Charles W. Gibson, Don M. Johnston and Gerald A. Johnston d/b/a Johnston-Gibson Sales Company, is a partnership whose address is P.O. Box 65, Edison, California.

2. Respondent, Feldman Brothers Produce Co., Inc., is a corporation whose address is P.O. Box 1345, Youngstown, Ohio. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On May 14, 1982, complainant sold to respondent, through the broker, Papazian Distributing Co., Inc., Salinas, California, one railcar of potatoes consisting of 50 one hundred pound sacks of 1A White Rose at \$12.00 per sack or \$600.00, 350 fifty pound sacks of 1A White Rose at \$6.40 per sack, or \$2,240.00, and 1,382 5/10 bales of #1 Whites at \$7.00 per bale, or \$9,674.00, plus \$22.50 for a temperature recorder, for a total of \$12,536.50 f.o.b. The potatoes were loaded on rail car SPFE 457389. On May 15, 1982, complainant prepared an invoice reflecting these contract specifications.

4. The potatoes were shipped in interstate commerce to respondent's place of business, where they arrived on May 25, 1982. Upon arrival, respondent secured a federal inspection which revealed as follows, in relevant part:

Condition of Equipment	Temperature controls in operation
Products Inspected:	Long White POTATOES in paper bags printed "Bluejay Brand, U.S. No. 1, California Potatoes, 10 lbs. net wt., grown and packed by Johnston Farms, Edison, Calif." Packed in mesh masters printed "U.S. No. 1, Top J, 5/10 lb. bags, Johnston Farms, Edison, Calif." Applicant states 1382 cartons.
Condition of Load:	In either end of car, 5/10's or 50 lb burlap, 8 rows, 12 layers, lengthwise; between doors, 5/10's or 100 lb. sacks, 3 rows, 5 to 10 layers, crosswise
Temperature of Produce:	Doorway* top 42, bottom 45°F.
Size:	Generally 1 1/2 inches in diameter to 8 ounces, average 1% undersize.
Quality:	Mostly practically no skinning, some slightly skinned, clean, generally well to fairly well shaped. Grade defects average 5%, cuts, bruises, misshapen and sunburn
Condition:	Firm. In most samples from 3 to 16%, many none, average 5% damage by raised discolored, blistered areas occurring around lenticels. Average 1% damaged by discoloration or sunken starchy areas. No soft rot.

PERISHABLE AGRICULTURAL COMMODITIES ACT
Volume 44 Number 1

Grade: Meets quality requirements but fails to
grade U.S. No. 1, account condition.

Remarks: Inspection and certificate restricted to
product in 5 upper layers of load.

5. Respondent related the inspection results to the broker, which conveyed this information to complainant. After an unsuccessful effort to arrive at a settlement, respondent advised the broker that it was rejecting the potatoes. The broker told this to complainant.

6. Complainant resold the potatoes to Sterman Masser, Inc., Valley View, Pennsylvania. Upon the arrival of the potatoes at Sterman Masser, Inc., they were inspected on June 1, 1982, which resulted as follows: in relevant part:

Condition of Equipment: *Temperature controls; in operation.*

Products Inspected: Long White POTATOES in mesh faced paper bags printed "Bluejay Brand, Johnston Farms, Edison, Calif., 10 lbs. net wt., U.S. No. 1.", and packed in plastic mesh master bags printed same brand and shipper and "5/10 lb. bags". Applicant states: 1380 master bags.

Condition of Load: Through, 4 to 7 rows 5 to 7 layers crosswise lengthwise load.

Temperature of Product: At doorway, Top 40°F., Bottom 40°F.

Size: Generally 2 inches in diameter or 4 to 12 ounces with 40% or more 6 ounces or larger. Undersize within tolerance.

Quality: Slightly skinned, cleaned, bright, generally fairly well to well shaped. Grade defects within tolerance.

Condition: Firm. No soft rot.

Grade: U.S. No. 1, Size A, 2 inch or 4 ounce minimum.

Remarks

Inspection and certificate restricted to product and lading in upper 3 layers of stacks between doors and in upper 4 layers of remaining portion of load. Car also contains 50 lb and 100 lb. lots not covered by this Certificate.

7. Complainant received \$8,919.50 from Sterman Masser, Inc.

8. To date, respondent has not made any payment to complainant for the potatoes.

9. An informal complaint was filed on October 25, 1982, which was within nine months from the time the cause of action herein accrued. A formal complaint was subsequently filed on January 24, 1983.

CONCLUSION

The parties agree that when the potatoes arrived at respondent's place of business, respondent rejected them. The issue in dispute is whether this rejection was wrongful.

Respondent secured a federal inspection May 25, 1982, when the potatoes arrived, which revealed that they failed to grade U.S. No. 1 (Finding of Fact 4). Complainant contends that the contract did not provide for U.S. No. 1 potatoes and that the May 5, 1982, inspection does not reflect any breach of its contract with respondent. However, complainant's own invoice shows that the 100 pound sacks and 50 pound sacks were "1A White Rose", and the 5/10 bales were "#1 Whites" (Finding of Fact 3). Complainant has not explained how these terms could mean anything but that the potatoes were to be U.S. No. 1 and we, therefore, hold that the contract called for U.S. No. 1 potatoes.

Complainant also disputes the results of the May 25, 1982, inspection, as it has placed into evidence another federal inspection taken on June 1, 1982, which found that the potatoes were U.S. No. 1 (Finding of Fact 6). The second inspection was not an appeal inspection and both were restricted. Under these circumstances, neither inspection should be given more weight. *Bud Antle, Inc. v. The Bohack Corporation*, 32 Agric. Dec. 1589 (1973). The most accurate indication of the condition of the potatoes in this case would be the average results of both inspections. If these two inspections are combined, the average condition defects are 2.5% damage by discolored, blistered areas and .5% damage by discoloration or sunken starchy areas. It is our conclusion that on the basis of the combined inspections, complainant has sustained its burden of proving

that the potatoes made good delivery and respondent's rejection was without reasonable cause. *Bud Antle, Inc. v. The Bohack Corporation, supra*. As damages due to respondent's wrongful rejection, complainant is entitled to the difference between the contract price of \$12,536.50 and the proceeds of its resale. *Blue Goose Growers, Inc. v. Prevor-Mayrsohn International, Inc.*, 41 Agric. Dec. 187 (1981). Complainant resold the potatoes to Sterman Masser, Inc., Valley View, Pennsylvania, and realized \$8,919.50. Respondent is thus liable for the difference between \$12,536.50 and \$8,919.50, or \$3,617.00, and its failure to pay this sum to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant as reparation \$3,617.00, with interest thereon at the rate of 13% per annum from July 1, 1982, until paid.

HE BRINGS CO. v. HRDLICKA DAIRY CATTLE, INC., a/t/a HRDLICKA
BROS. PRODUCE CO. PACA Docket No. 2-6684. Decided January
10, 1985.

Payment of undisputed amount.

Andrew Y. Stanton, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on June 20, 1984, and a formal complaint was filed on July 30, 1984. Complainant seeks to recover \$1,987.50, which amount is alleged to be the total purchase price for onions sold to and accepted by respondent in October and November, 1983. Respondent filed an answer to the formal complaint on October 10, 1984, apparently admitting that \$1,655.25 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein. Respondent was sent a letter by the Department, giving it an opportunity to show cause why an order for undisputed amount totalling \$1,655.25

should not be issued against it. Respondent did not make such a showing.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$1,655.25. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from December 1, 1983, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

B. G. ENTERPRISES, INC., v. COLVIN GIFTS a/t/a COLVIN DISTRIBUTING CO. PACA Docket No. 2-6434. Decided January 11, 1985.

Price after sale contract—Reparation awarded.

Edward M. Silverstein, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$1,684.60 in connection with one transaction in interstate commerce involving cucumbers, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint. Although respondent failed to file a timely

answer, it petitioned for the setting aside of its default. An order granting its petition was issued on December 6, 1983, and its proposed answer was ordered to be filed. In its answer, respondent denied any further liability to complainant.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) has been followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed an opening statement, respondent an answering statement, and complainant also filed a statement in reply. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, B.G. Enterprises, Inc., is a corporation whose mailing address is P.O. Box 1806, Nogales, Arizona 85621.

2. Respondent, Colvin Gifts a/t/a Colvin Distributing Co., is a corporation whose mailing address is P.O. Box 413, Millbrae, California 94030. At all material times, respondent was licensed under the Act.

3. On February 15, 1983, in the course of interstate commerce, respondent purchased 432 crates of Super Select cucumbers from complainant at an f.o.b. price of \$10.00 per crate plus 50 cents per crate for cooling and palletizing, for a total f.o.b. contract price of \$4,536.00. Respondent was represented by Mr. Joe James, Joe James, Inc., 1221 Meadow Hills Drive, Nogales, Arizona 85621. Complainant was represented by its employee, Mr. Mike Salazar. Joe James, Inc. issued a Confirmation of Sale on February 16, 1983, indicating that the cucumbers were to be shipped to Landover, Maryland.

4. On February 15, 1983, Joe James, accompanied by Mike Salazar, inspected crates containing "Si Chuey" brand cucumbers, and indicated that he was satisfied with the condition of the cucumbers. Mr. Salazar and he then agreed to enter into the contractual agreement described above. On the next day, when Mr. John James, also of Joe James, Inc., viewed the cucumbers being loaded on board the truck which Joe James, Inc., had sent to complainant's premises on respondent's behalf, he found that 144 crates of "Rene" brand were loaded on board, and that the only cucumbers on the loading dock were "Rene," rather than "Si Chuey" brand. He inspected them, and indicated that he was satisfied with the quality. Mr. James did not view the remainder of the loading. Upon arrival at respondent's

ent's customer, Max Shapiro, Inc., Landover, Maryland, on February 21, 1983, it was discovered that 210 of the 432 crates were "Chuy" brand, rather than either "Si Chuey" brand or "Rene" brand. Neither Joe James nor John James had inspected any "Chuy" brand cucumbers.

5. Respondent was informed by Max Shapiro, Inc., that it was not accepting the 210 crates of "Chuy" brand cucumbers which it claimed were decayed and "ugly." In view of this, respondent had the 210 crates moved to the warehouse of Jumbo Foods, a retailer, in Landover, Maryland. Joe James reported these events to Mike Salazar who agreed to have respondent handle the 210 crates for complainant's account.

6. On February 22, 1983, the 210 crates of cucumbers were the subject of a federal inspection while at the Jumbo Food's warehouse. The inspection certificate issued thereafter (No. E 241485) indicates that the crates were labeled, in pertinent part, "Chuy Cuke, Distributed by Gary's Produce, Chula Vista, California * * *." The quality of the cucumbers was reported as follows: "Fairly clean, well formed and well colored. Grade defects average 2% scars." In addition, the condition of the cucumbers was reported as follows: "Generally, fresh and firm. Average 3% damage by yellowing. Decay ranges from 2 to 9% average 6% Cottony Leak Rot in various stages." The grade of the cucumbers was reported as follows: "Meets quality requirements, but fails to grade U.S. No. 1 only account of condition."

7. After the federal inspection, the results were reported to Mike Salazar by Joe James. The two agreed that respondent would handle the cucumbers through Jumbo Foods on a price after sale basis. As the sales would be made through the Jumbo Food's retail stores, both parties understood that no detailed account of sales could be made. Respondent mailed an "Adjustment Report" to complainant reflecting their agreement, on February 22, 1983. On February 28, 1983, respondent agreed to accept a price of \$6.00 delivered per crate for each of the 210 crates of cucumbers from Jumbo Foods.

8. Respondent's freight cost on the cucumbers was \$3.36 per crate.

9. Respondent paid complainant \$2,851.40 with respect to the 432 crates of cucumbers originally shipped.

10. The formal complaint was filed on July 26, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

There is little dispute about the facts in this case. Complainant shipped respondent 432 crates of cucumbers. 210 of the 432 crates were not in accordance with the parties' contract, and the parties agreed that respondent could sell the cucumbers to Jumbo Foods, a retailer, on a price after sale basis. Subsequent to the sale, respondent and Jumbo Foods agreed on a price of \$6.00 per crate delivered. After this was reported to complainant, it attempted to void its agreement with respondent because it was dissatisfied with the return, and brought this action seeking the full contract price. However, since complainant clearly entered into this arrangement voluntarily and after being advised by respondent of its alternatives, it cannot now step back from it and insist on the full contract price. There is no dispute that respondent received \$6.00 per crate from Jumbo Foods, and there is no dispute that it paid \$3.36 per crate as a freight cost. Under these circumstances, respondent was obligated to complainant in the amount of \$2,885.40 (\$10.50 per crate for 222 crates (\$2,331.00) plus \$2.64 per crate (\$6.00 less \$3.36) for 210 crates (\$554.40)). It paid complainant \$2,851.40, and is not entitled to be reimbursed for the cost of the federal inspection. Thus, respondent remains obligated to complainant in the amount of \$34.00 (\$2,885.40 less \$2,851.40). Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this Order, respondent shall pay complainant \$34.00, as reparation, plus interest in the amount of 13% per annum from April 1, 1983, until paid.

SIN-SON PRODUCE CO., INC. v. TOM LANGE COMPANY, INC. PACA
Docket No. 2-6489. Decided January 11, 1985.

F.O.B. sale—Average condition defects—Modified contract—Failure to keep records—Reparations awarded.

Dennis Becker, Presiding Officer

James A. Soto, Nogales, Arizona, for complainant

Le Roy W. Sudgean, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$5,821.20 in connection with the sale of a truckload of tomatoes in interstate and foreign commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant, and which in addition filed a counterclaim. Complainant filed an answer to the counterclaim. Because the amount claimed as damages was less than \$15,000, as was the amount of the counterclaim, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an Opening Statement, and respondent filed an Answering Statement. Both parties were given an opportunity to file a brief, and respondent did so.

FINDINGS OF FACT

1. Complainant, Sin-Son Produce Co., Inc., is a corporation with an address at P.O. Box 1566, Nogales, Arizona. At the time of the transaction involved in this proceeding complainant was licensed under the Act.

2. Respondent, Tom Lange Company, Inc., is a corporation with an address at 5231 South Sixth Street, Springfield, Illinois. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On March 14, 1983, complainant sold to respondent a truckload of tomatoes with an origin in Mexico. The truckload contained 660 flats of 4 × 5 tomatoes at \$5.90 per flat for a total price of

\$3,894, 528 flats of 5 × 5 tomatoes at \$5.90 per flat for a total price of \$3,115.20, and 324 lugs of 6 × 6 tomatoes at \$7.90 per lug for a total price of \$2,559.60, plus 50 cents per flat or lug for pallets and precooling for a total of \$756 and a total contract price of \$10,324.80. The shipment was f.o.b., and the tomatoes were to be 85% U.S. No. 1 at shipping point in Arizona. The truck left Arizona on March 14, 1983, and arrived in Chicago on March 17, 1983, where it was received and accepted by respondent through its customer Western Produce Company, in Chicago, Illinois.

4. At 3:30 a.m. on March 18, 1983, Western Produce Company had the tomatoes inspected at its warehouse. The inspection showed with respect to the 6 × 6 tomatoes, which are the 3 layer lot, that they made good delivery as U.S. No. 1 tomatoes. With respect to the other tomatoes, which are the two layer lot, the condition was not as good. The inspection showed the condition as follows:

2 layer lot: Average approximately 10% green and breakers, 30% turning and pink, 45% light red and red. Decay ranges 1 to 4 tomatoes (2 to 8%), averages 6%. Soft ranges 1 to 6 tomatoes (3 to 12%), averages 8%. Damage by bruising ranges 1 to 5 tomatoes (3 to 10%), averages 8%. *3 layer lot:* Average approximately 55% turning and pink, 45% light red and red. Decay average 1%. Damage by bruising ranges 4 to 8%, averages 6%. *Each lot:* Decay Gray Mold Rot, in advanced stages and bruising scattered throughout pack, affecting light red and red tomatoes. *3 layer lot:* U.S. No. 1. *2 layer lot:* Meets quality requirements but fails to grade U.S. No. 1 only account of condition.

5. Prior to their receipt respondent had sold the load of tomatoes at delivered prices of \$11.15 per lug for the 6 × 6's for a total price of \$3,612.60, and \$8.90 per flat for the 4 × 5 and 5 × 5 tomatoes for a total price of \$10,573.20, and a total contract price for all the tomatoes of \$14,185.80, such tomatoes to be 85% U.S. No. 1 quality.

6. Upon learning that the 4 × 5 and 5 × 5 tomatoes were not 85% U.S. No. 1 when they arrived in Chicago, respondent negotiated a modification of the contract with complainant under which it was to handle those tomatoes for complainant's account. It handled them through Western Produce Company, and rendered an accounting to complainant which showed that they were sold for the account of complainant at \$4.00 per flat, fetching a total of \$4,752.00. From this amount respondent deducted \$1,425.60 for freight and it claimed lost profit of \$1,544.40 for a total of \$2,970.00, and remitted to complainant \$1,782.00, along with \$2,721.60 for the

6 × 6 tomatoes at the contract price plus the pallets and precooling charge, for a total remittance of \$4,503.60.

7. A formal complaint was filed in this proceeding on August 19, 1983, which was within nine months from the time the cause of action herein accrued. The counterclaim in this proceeding was filed on November 21, 1983, and was timely.

DISCUSSION

This proceeding involves the shipment of a truckload of tomatoes which originated in Mexico, and were shipped through Arizona to respondent's customer in Chicago, Illinois. The truckload contained three different sizes of tomatoes. When the truck was unloaded by respondent's customer, Western Produce Company, the entire load of tomatoes was accepted because a receiver cannot accept a part of a truckload of perishable agricultural commodities while rejecting the rest. The must be treated as a commercial unit. *Salinas Lettuce Farmers Cooperative v. Larry Ober Company*, 39 Agric. Dec. 65, 67-70 (1980). It was obvious to Western Produce Company that the 4 × 5 and 5 × 5 tomatoes were not in particularly good condition. Since it had contracted with respondent for the delivery of tomatoes which were 85% U.S. No. 1, as had respondent with complainant,¹ Western Produce Company caused an inspection to be made of all of the tomatoes. The inspection showed that the 6 × 6 tomatoes were 85% U.S. No. 1 at destination, but that the 4 × 5 and 5 × 5 tomatoes were not because condition defects exceeded 15% of the amounts involved. Since the shipment must be considered to be a commercial unit, the condition of the 6 × 6 tomatoes must be averaged in with the condition of the 4 × 5 and 5 × 5 tomatoes to determine whether they were 85% U.S. No. 1. The 1,188 flats of 4 × 5 and 5 × 5 tomatoes showed an average of 22% condition defects. The 324 lugs of 6 × 6 tomatoes showed an average of 7% condition defects. If the percentage of condition defects for the 6 × 6 tomatoes and the 4 × 5 and 5 × 5 tomatoes is averaged out in accordance with the proportion of the number of flats or lugs to the total in the shipment, we find that the entire shipment averaged 19% condition defects. Based upon the average condition defects for the entire load we find that the entire load made good delivery because this was an f.o.b. contract in which, after giving an allowance for the 15% of the tomatoes that the parties agreed did not have to be U.S. No. 1 at point of origin, it is reasonable that 19% of the tomatoes may be less than U.S. No. 1 at destination. Indeed, the practice in the industry has been that when tomatoes are sold as

¹ See admission in paragraph 5 of Answer.

85% U.S. No 1 f.o.b., they have been consistently held to have made good delivery when they had condition defects higher than that found in this destination inspection. *Stockton Tomato Co., Inc. v. Albee Tomato Co., Inc.*, 28 Agric. Dec. 1051 (1969); *The Produce Exchange, Inc. v. Tom Lange Co., Inc.*, 42 Agric. Dec. ____ (1982).

However, according to respondent it notified complainant as to the condition of the 4 × 5 and 5 × 5 tomatoes. Complainant claims such is not the case. As the proponent of a modification in the contract respondent has the burden of proof. *American Banana Co., Inc. v. Marvin Gray*, 41 Agric. Dec. 539 (1982). We find that it has met this burden. Respondent provided affidavits by Michael R. Patton in its Chicago office and Peter Hernandez, who at the time of the transaction was working in Nogales, Arizona for respondent. Complainant submitted an affidavit by Yolanda Cluff. Mr. Hernandez claims that on March 18, 1983, he contacted Jose Gomez of complainant's firm, and conveyed to him the information regarding the condition of the tomatoes as reflected by the inspection certificate. He claims that Mr. Gomez told him "that Western Produce, Inc. was to handle the 1,188 two-layer flats for the account of Sin-Son Produce, Inc.", and that he relayed this information that same day to Mr. Patton.

Mr. Gomez did not submit an affidavit. Complainant did, however, provide an affidavit by Yolanda Cluff, another of its employees. She claimed that respondent did not advise complainant of the condition of the loan until June 14, 1983, when she talked with Mr. Patton. However, she gave no indication as to whether she had any knowledge of prior conversations between Mr. Hernandez and Mr. Gomez. Thus, her statement cannot be given much weight, and we find that respondent has carried its burden of proving that there was a modification of the contract under which the 4 × 5 and 5 × 5 tomatoes would be handled for the account of complainant by respondent's customer, Western Produce.

Respondent has claimed that it had a contract with Western Produce under which it would resell to it on a delivered basis the 1188 flats of 4 × 5 and 5 × 5 tomatoes for \$8.90 a flat for a total contract price of \$10,573.20. It also claims that it paid freight in the amount of \$1,425.60, and realized lost profits in the amount of \$1,544.20 as a result of the modified contract because it received only \$4.00 per flat of tomatoes for a total of \$4,752.00. Therefore, it as deducted \$2,970.00 from the \$4,752.00 received from Western Produce, and paid complainant \$1,782.00 for the 4 × 5 and 5 × 5 tomatoes. Since we have previously found that the tomatoes made good delivery, respondent is not entitled to lost profits.

Respondent claimed that Western Produce sold the 1188 flats of tomatoes for \$5.00 and \$6.00 per flat, and remitted to it \$4.00 per flat after deducting expenses. However, it provided only a summary statement, and did not provide any account of sales. Therefore, its statement cannot be accepted as an accurate reflection of the prices fetched for the tomatoes. *Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979); *Genbroker Corp. v. Super Food Services*, 38 Agric. Dec. 83 (1979). It did, however, provide Market News Reports for Chicago, Illinois for March 18, 21, and 22, 1983. These reports did not provide prices for 4 × 5 and 5 × 5 Mexican Tomatoes. They showed for 5 × 5 and 5 × 6 two layer Mexican tomatoes that the average prices fetched on March 21, 1983 were \$13.00–\$15.00, most \$14.00, and on March 22, 1983, were the same. Since the Market News prices for comparable tomatoes are far higher than the prices respondent claimed were fetched, we are further constrained from accepting its claim as accurate. Therefore, we accept complainant's claim as to the amount to which it is entitled as reasonable, less the freight originally paid by respondent. Thus, respondent should have received \$7,009.20 for the 1188 flats plus \$594.00 for pallets and precooling, for a total of \$7,603.20, less \$1,425.60, for a total of \$6,177.60. Since respondent has previously paid complainant \$1,782.00, it still owes \$4,395.60.

We find that respondent has failed to pay complainant \$4,395.60 with respect to the transaction involved. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest. We further find that respondent's counterclaim is without merit, and should be dismissed.

ORDER

Within 30 days from date of this Order respondent shall pay to complainant, as reparation, \$4,395.60 with interest thereon at the rate of 13 percent per annum from May 1, 1983, until paid.

The counterclaim in this proceeding is dismissed.

PACIFIC VALLEY PRODUCE CO. v. THE GARIN COMPANY. PACA
Docket No. 2-6477. Decided January 11, 1985.

Condition defects—Dismissed.

Andrew Y Stanton, Presiding Officer

Complainant, *pro se*.

Thomas R. Oliveri, Newport Beach, California, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$4,822.20 in connection with a quantity of lettuce shipped in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as to file briefs. Complainant submitted an opening statement, respondent submitted an answering statement, and the complainant submitted a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Pacific Valley Produce Co., is an individual, Gregory A. Plaskett, whose address is P.O. Box 1688, Salinas, California.

2. Respondent, The Garin Company, is a corporation whose address is P.O. Box 18731, Salinas, California. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On November 3, 1982, complainant purchased from respondent 162 cartons of iceberg lettuce, cello wrapped, at \$6.50 per carton us \$.65 per carton cooling, for a total of \$3,303.30, f.o.b. The contract provided that good delivery terms were to apply, excluding bruising and/or discoloration following bruising.

4. On November 8, 1982, respondent prepared an invoice containing the contract terms set forth in Finding of Fact 3 and sent it to complainant. Complainant never objected to the invoice.

5. On November 3, 1982, the lettuce was shipped in interstate commerce to complainant's customer, Winn-Dixie Stores, Tampa, Florida, which had purchased the lettuce from complainant for \$4,897.20. The lettuce arrived at Winn-Dixie Stores on November 7, 1982, and a federal inspection was taken which revealed the following condition: "Heads or portion of heads not affected by condition defects are fresh and crisp. *Head Leaves*: From 3 to 13 heads per carton, averaging 32% damage by discoloration following bruising. No decay." Complainant received only \$75 for the lettuce on resale.

6. Complainant has paid respondent the entire contract price of \$3,303.30.

7. An informal complaint was filed on May 16, 1982, which was within nine months from when the alleged cause of action herein accrued. A formal complaint was subsequently filed on December 16, 1983.

CONCLUSIONS

Complainant purchased 462 cartons of iceberg lettuce from respondent for shipment to its customer, Winn-Dixie Stores, Tampa, Florida. Complainant claims that the lettuce was in poor condition when it arrived in Tampa, in breach of warranty, and requests damages consisting of the difference between the proceeds it expected to receive on resale, \$4,897.20, and the \$75 that it actually received, or \$4,822.20. Respondent denies committing any breach of warranty.

A federal inspection was taken on November 7, 1982, when the lettuce arrived in Tampa, Florida. The inspection reveals condition defects of an average of 32% discoloration following bruising, with no decay. Respondent claims that this does not constitute a breach of warranty, as the contract specifically excluded damages from bruising and/or discoloration following bruising. Respondent asserts that this was made clear to complainant when the contract agreement was originally made. Complainant denies that this term was discussed. However, the record clearly supports respondent's version of the events, as on November 8, 1982, respondent sent an invoice to complainant, stating that damages due to bruising and/or discoloration following bruising were excluded. Complainant does not deny receiving this invoice and that it made objection to it. Therefore, the terms of the invoice are considered evidence of the contract terms agreed upon by the parties. *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972).

The lettuce clearly complied with the contract upon its arrival at Winn-Dixie Stores. Therefore, respondent has no legal basis for its complaint, and it must be dismissed.

ORDER

The complaint is hereby dismissed.

BIG RED TOMATO PACKERS *v.* SCHERER & LUNDY PRODUCE, PACA
Docket No. 2-6555. Decided January 11, 1985.

Oral contract—Reparation awarded.

Edward M. Silverstein, Presiding Officer.

Richard V. Noill, Jr. Fort Pierce, Florida, for complainant.

Martin Levinson, Miami, Florida, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation in the amount of \$20,884.20 in connection with one shipment of tomatoes, a perishable agricultural commodity, in interstate commerce.

Both parties were served with a copy of the Department's report of investigation. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto admitting liability to the complainant in the amount of \$9,936, but denying any further liability to complainant. In view of respondent's answer, an Order Requiring Payment of Undisputed Amount was issued, on June 14, 1984, requiring that respondent pay complainant the \$9,936 which it admitted owing complainant.

Although the amount claimed as damages exceeded \$15,000, the parties waived oral hearing and the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20), was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Big Red Tomato Packers, is a partnership composed of Kenneth L. Neill, Mabel Groves, Ltd., Richard V. Neill, Mary Sue Neill, and James David Neill, whose mailing address is P.O. Box 1646 (3500 Enterprise Road), Fort Pierce, Florida 33454.

2. Respondent, Scherer & Lundy Produce, is a partnership composed of David H. Scherer and Mary L. Scherer, whose address is P.O. Box 1995, Bonita Springs, Florida 33923. At all material times, respondent was licensed under the Act.

3. On April 1, 1983, in the course of interstate commerce, by oral contract, complainant sold respondent a load of tomatoes consisting of 1,838 25 pound cartons for a total agreed f.o.b. contract price of \$20,884.20. The details as to this load of tomatoes are as follows:

Amount	Size	Identity	Price per Car- ton	Total Price
216	6×7	No 2	\$5 00	\$1,080.00
144	6×7	Big Red	7 50	1,080 00
216	6×7	L. Pink	6.00	1,296.00
360	6×6	Pink	16 00	5,760.00
216	6×7	Pink	6 00	1,296.00
144	6×6	No 2/3	15.00	2,160.00
81	5×6	L. Pink	18.00	1,458.00
110	6×6	L. Pink	16.00	1,760.00
23	6×7	L. Pink	6 00	138.00
289	6×6	Pink	14.50	4,190.50
39	6×6	Ripe	10.00	390.00
	Pal- letizing			275.70
1,838				\$20,884.20

4. On April 1, 1983, the complainant shipped the above-described load of tomatoes to the respondent in a truck with Florida license tag L68486. Upon arrival at respondent's location, the tomatoes were received and accepted.

5. The informal complaint was filed on August 30, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The single issue for resolution of this matter is whether or not the respondent agreed to make the purchase as claimed by the complainant. In its answer, the respondent denied the complainant's allegations in part. With regard to that which was admitted, the respondent has already been ordered to pay the complainant \$9,936. With regard to the tomatoes representing the remaining \$10,948.20, we are satisfied that the complainant has carried its burden of proving by a preponderance of the evidence that it and the respondent entered into the transaction as the complainant al-

leged in its complaint. Such evidence consists of a verified statement from the complainant's general manager in which he attested to the manner in which the complainant did business. Its practice required that its sales persons complete a sales order after a sale has been agreed upon with a buyer. The complainant included with its affidavit a copy of two sales orders which cover most of the tomatoes in question and indicated that the third sales order had been misplaced. In view of the fact that the respondent failed to respond to the complainant's opening statement, although having been given full opportunity to do so, we accept the complainant's statement as to the facts involved.

On the basis of all of the evidence in the record, we conclude that the respondent has failed to pay the complainant \$10,948.20 with regard to the subject shipments of tomatoes, and its failure to do so is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, complainant shall pay respondent \$10,948.20, as reparation, with interest thereon at the rate of 13% per annum from May 1, 1983 until paid.

PAT DISTRIBUTING CO. OF CALIFORNIA, INC. v. STANLEY & JOE
RUSSO. PACA Docket No. 2-6571. Decided January 11, 1985.

Inspection—Account of sales—Reparation awarded.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$10,962 in connection with the sale of a partial truckload of strawberries in interstate commerce.

A copy of the Report of Investigation prepared by the Department was served upon both parties. A copy of the formal complaint was served upon respondent which filed an unsworn answer thereto denying liability to complainant. Because the amount claimed as damages is less than \$15,000, the shortened method of procedure

provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. Although the parties were given the opportunity to file evidence in the form of verified statements, neither party did so. Neither did either party file a brief.

FINDINGS OF FACT

1. Complainant, PAT Distributing Co. of California, Inc. is a corporation with an address at P.O. Box 4398, Salinas, California.

2. Respondent, Stanley & Joe Russo, is a partnership comprised of those two individuals with an address at 1169 East 37th Street, Brooklyn, New York. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On December 30, 1983, Interfruit, Inc., Los Angeles, California, sold to respondent 1,218 flats of strawberries at \$9.00 per flat for a total contract price of \$10,962, f.o.b. Complainant was the broker with respect to this transaction, and had agreed with Interfruit, Inc., that it would affect collection for the risk and account of Interfruit, Inc. Complainant conveyed to respondent by means of its invoice the fact that respondent was to pay it with respect to the transaction.

4. The strawberries were shipped on December 30, 1983, from Texas to respondent in New York, where they were received and accepted on January 3, 1984. During transit the temperatures ranged from 40 to 42°F. inside the truck.

5. The strawberries were subjected to a federal inspection on January 3, 1984. It showed in pertinent part that they were "Generally ripe and firm, Average 2% ripe and soft berries. 5 to 16% average 11% damage by bruising scattered throughout cups. None in most cups, 8 to 12% in many average 4% Gray Mold Rot in various stages. Selected Strawberries 6 to 15% per cup average 10% damage by bruising scattered throughout cups. None in most cups 5 to 12% in many, average 4% Gray Mold Rot in various stages." Respondent did not notify complainant that there had been an inspection until February 14, 1984.

6. Respondent has not paid complainant any money with respect to this transaction.

7. A formal complaint was filed on March 12, 1984, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

Because respondent accepted the strawberries it has the burden of proof to show that it suffered damages. *Growers Produce v. Star*

Produce, 33 Agric. Dec. 693, 696 (1974). Respondent has failed to do so. In the first place, respondent submitted an answer which was not properly verified as required by 7 CFR § 47.20(h). Therefore, since this was the only document which respondent submitted, in effect it submitted no evidence in this proceeding. Secondly, although the inspection certificate shows that the strawberries did not make good delivery, complainant was not notified of its existence until five weeks after the inspection occurred. That is simply too long a delay for respondent to be allowed to claim it suffered damages. In any event, it has long been held that in order to prove damages it is necessary for a party to show by credible evidence the amount of damage it suffered. *Cal-Shred, Inc. v. George DePoole Distributing Company*, 42 Agric. Dec. — (1983); *Crane Distributing Company v. Anthony Abbate Fruit Distributors*, 31 Agric. Dec. 902 (1972). Respondent failed to submit the usual document, which is an account of sales, to reflect the prices fetched for the strawberries. Therefore, respondent is liable for the entire purchase price of the strawberries. Although, at one point it offered a check in the amount of \$2,923.20 to complainant with respect to the transaction, complainant did not accept that check. Therefore, respondent is liable for the entire purchase price of the strawberries.

In view of the above respondent owes complainant \$10,962.00 with respect to the transaction involved in this proceeding. Its failure to pay this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty (30) days from the date of this order respondent shall pay to complainant, as reparation, \$10,962.00, with the interest thereon at the rate of 13% per annum from February 1, 1984, until paid.

J. A. WOOD CO.-VISTA, INC. v. BILLINGSLEY FARMS, INC. PACA
Docket No. 2-6405. Decided January 15, 1985.

Price increase due to changed pick-up date—Dismissal.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award in the amount of \$1,008 in connection with the sale of a truckload of lettuce in interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto, denying liability to complainant. Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure, the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. Although given the opportunity to file briefs, neither party took such action.

FINDINGS OF FACT

1. Complainant, J. A. Wood Co.-Vista, Inc., is a corporation with an address at P. O. Box 9069, Phoenix, Arizona.

2. Respondent, Billingsley Farms, Inc., is a corporation with an address at 5221 Beachcomber, Oxnard, California. At the time of the transaction involved in this proceeding, respondent was licensed under the Act.

3. On April 4, 1983, complainant sold to respondent 504 cartons of lettuce at \$6.50 per carton plus 80¢ per carton cooling and \$22.50 for a Ryan Thermometer for a total invoice price of \$3,701.70, f.o.b. Ken Vilhauer Co., Salinas, California acted as a broker with respect to the transaction.

4. On April 5, 1983, the truck driver called complainant from a nearby location and was told the lettuce would be available on April 6, 1983. The driver returned with his truck on that date, and while the lettuce was being loaded, complainant advised Ken Vil-

hauer Co. that the price of lettuce had been raised from \$6.50 per carton to \$8.50 per carton. This information was passed on to respondent at an unknown time.

5. The goods were shipped from loading point in Arizona to Atlanta, Georgia to respondent's customer. The lettuce was unloaded and accepted in Atlanta. Respondent paid complainant \$3,701.70 with respect to the transaction.

6. A formal complaint was filed in this matter on August 22, 1983, which is within nine months of the time the cause of action herein accrued.

DISCUSSION

The facts are not in issue in this case. The only issue is whether the complainant had a right as a result of a delay in picking up lettuce on the part of respondent to increase the price. Based upon our analysis of the facts, we conclude that complainant did not have such right, and that respondent must prevail in this proceeding.

The original contract called for the sale of 504 cartons of lettuce at \$6.50 per carton plus 80¢ per carton cooling and \$22.50 for a Ryan Thermometer for a total contract price of \$3,701.70. This contract was entered on April 4, 1983. Respondent was to provide the truck for shipment of the lettuce. The truck driver called complainant from a nearby location on April 5, 1983, in the early evening. Complainant advised the truck driver there was not lettuce available for loading at that time, and that he should return the next morning. The driver did so. It was at that time that complainant said that due to the delay, the price of the lettuce was being raised \$2.00 per carton. This information was conveyed to Ken Vilhauer Co., the broker. It is not known when Ken Vilhauer relayed the information to respondent. However, the evidence is uncontroverted that both the broker and respondent disputed the increase in price at the time that they were advised of it.

The truck driver loaded his truck and proceeded to destination in Atlanta, Georgia, where the lettuce was delivered to respondent's customer.

Since the terms of the contract were firm, and there is no indication that loading the lettuce as of a specific date was a condition of the contract, we must conclude that respondent is not liable with respect to the increase in price which complainant seeks to enforce. Such action on the part of the complainant is unilateral. Respondent was entitled to rely on the contract price agreed upon on April 4, 1983, which was \$6.50 per carton. Therefore, the complaint must be dismissed.

ORDER

The complaint in this proceeding is dismissed.

BUD FARMS, INC. v. MELONS, INC. PACA Docket No. 2-6489. Decided January 15, 1985.

Purchase party in dispute—Reparation awarded.

Edward M. Silverstein, Presiding Officer.

Richard A. Wagner, Orlando, Florida, for complainant.

Respondent *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of \$2,860 in connection with two transactions, in interstate commerce, involving watermelons, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Bud Farms, Inc., is a corporation whose mailing address is 5870 Tomoka Drive, Orlando, Florida 32809.

2. Respondent, Melons, Inc., is a corporation whose mailing address is P.O. Box 36, Yemassee, South Carolina 29945. At all material times, respondent was licensed under the Act.

3. On or about November 19, 1982, in the course of interstate commerce, complainant, by oral contract, sold to respondent a truckload of watermelons consisting of 11,709 pounds of size 4, and 3,152 pounds of size 5, at agreed f.o.b. prices of \$9.00 per hundred-

weight for the size 4 watermelons (\$1,052.81), and \$8.00 per hundredweight for the size 5 watermelons (\$252.16), for a total agreed f.o.b. price of \$1,305.97.

4. On or about November 23, 1982, in the course of interstate commerce, complainant, by oral contract sold to the respondent, a truckload of size 3 and size 4 watermelons consisting of 41,638 pounds at an agreed f.o.b. price of \$10.00 per hundredweight for a total f.o.b. price of \$4,163.80.

5. The watermelons described in paragraphs 3 and 4 above were shipped either to respondent or to its customers on November 19, and November 23, 1982, respectively. Said shipments were to South Carolina and/or to Massachusetts. Upon arrival of the watermelons at their destination, respondent accepted them.

6. The purchase and sale agreement was entered into between the two parties with a Mr. Gus Marinello acting for the complainant and a Mr. Ben Josselson acting for the respondent. In addition to being a principal and agent for the respondent corporation, Mr. Josselson is also a principal and agent for another corporation, B & B Truck Brokers, Inc., which has as its mailing address the same post office box number as the respondent.

7. Complainant at first billed Melons, Inc., for the two loads of watermelons. By letter dated November 30, 1982, however, the respondent sent the complainant the following letter which was signed by Mr. Josselson:

We are returning the attached invoices covering watermelons and request that you invoice direct to B & B Truck Brokers, Inc. [sic] P.O. Box 36, Yemassee, S.C. 29945.

Melons, Inc. only purchases watermelons during regular season, therefore, when watermelons are handled at any other time, we purchase through B & B Truck Brokers, Inc.

Upon receiving that letter, the complainant's bookkeeper, Ms. Cathy Hart, reinvoiced B & B Truck Brokers, Inc., without consulting with either Mr. Marinello, or with Mr. Mack Fulmer, who is president of the complainant corporation. Subsequent thereto, Mr. Fulmer informed her that her rebilling B & B Truck Brokers, Inc., was an error. Consequently, on January 3, 1983, the following telegram was sent to respondent by Ms. Hart:

DEAR SIR CONCERNING YOUR LETTER NOVEMBER 30 1982 WITH THE INVOICING OF 2 LOADS OF WATERMELON BUD FARM SALES INC NUMBER 4273 and 4299 WE ARE NOT ABLE TO COMPLY IN THAT

MANNER THE INVOICES WILL HAVE TO BE PAID TO BUD FARMS SALES INC BY MELLON [SIC] INC AND NOT TO BE PAID TO BUD FARMS INC BY B & B TRUCK BROKERS INC BUD FARMS SALES INC AND BUD FARMS INC ARE TWO DIFFERENT COMPANIES OWNED BY TWO DIFFERENT PARTNERS

On that same date the following letter was sent to respondent signed by a Mr. Benjamin McGee of Bud Farm Sales, Inc., and Mack Fulmer, Bud Farms, Inc.:

Please find enclosed copies of the original invoices sent to Melons, Inc. for Bud Farm Sales, Inc., #4274 and #4299.¹ As expressed in our telegram to you on January 3, 1983 we expect prompt [sic] payment to Bud Farm Sales, Inc. from Melon, Inc. And not payment against these invoices to Bud Farms, Inc. from B & B Truck Brokers, Inc. Enclosed you will find a copy of the letter to B & B Truck Brokers, Inc. voiding the invoices sent to them and relieving them of payment of the invoices.

We are not able to accept payment in the fashion of your letter due to Bud Farms Sales, Inc. and Bud Farms, Inc. being two separate companies held by two different sets of partners.

On that same date, the same two individuals sent the following letter to B & B Truck Brokers, Inc.:

Due to a letter from Melons, Inc. we, Bud Farm Sales, Inc., sent to you, B & B Truck Brokers, Inc., two invoices (#4299 and #4273) for loads of watermelons. We are not able to comply in this manner. Therefore we are relieving [sic] your account of the enclosed invoices. You will also find enclosed a letter to Melon, Inc. explaining that we expect payment from them to Bud Farm Sales, Inc.

8. On or about January 5, 1983, B & B Truck Brokers, Inc. paid complainant \$2,609.77 with respect to the two subject loads of watermelons. It withheld payment of \$2,860 due to "CK 168 & advances."

9. On or about June 9, 1982, the complainant received a check in the amount of \$2,260 with respect to the subject lots of watermelons from a Mr. Ralph Ray of Barnwell, South Carolina 29812. This represented payment of monies due respondent, which respondent

¹ The invoices were, in fact, sent by Bud Farms, Inc., and not Bud Farm Sales, Inc.

evidently had requested that Mr. Ray pay to complainant. However, the complainant was unable to negotiate this check as it was returned marked "ACCOUNT CLOSED."

10. An informal complaint was filed on June 13, 1983, which was within nine months of when the causes of action herein accrued.

CONCLUSIONS

The sole issue in this case is whether or not the respondent was the purchaser of the two loads of watermelons, or whether the purchaser was B & B Truck Brokers, Inc., which is a separate corporation operated and owned by the same principals.² As to this issue, the complainant has the burden of proving by a preponderance of the evidence that it had entered into a contract for the purchase and sale of the watermelons with the respondent. *Dichter Bros. & Glass, Inc. v. Ravinsky*, 29 Agric. Dec. 332 (1970). In this case, the complainant has submitted a verified opening statement containing evidence from all of its employees who were involved in the transaction. All of these employees support the position taken by the complainant in this matter. Although the respondent filed an answer denying liability to the complainant and averring that another corporation, B & B Truck Brokers, Inc., was liable to the complainant, it failed to submit any response to the complainant's sworn opening statement. We find, therefore, that the complainant has sustained its burden of proving by a preponderance of the evidence that the named respondent was the party which entered into the contract with it. In addition, the complainant has proven that the respondent failed to satisfy its obligation to pay complainant the full amount due and owing on the two contracts in that it has failed to make payment to the complainant in the amount of \$2,860. Respondent's failure to pay complainant the \$2,860 is a violation of Section 2 of the Act for which reparation plus interest should be awarded.

² The Hart telegram of January 3, 1983, and the McGee/Fulmer letters of the same date raise a question as to whether complainant or Bud Farm Sales, Inc., a separate entity, was the seller of the two loads of watermelons which are the subject of the complaint filed herein. However, in spite of the assertions in those documents, we hold that it was complainant which was the seller. Our basis for so ruling is found in the allegations contained in the verified complaint, and the fact that the complainant, and not Bud Farm Sales, Inc., invoiced respondent.

ORDER

Within thirty days from the date of this Order, respondent shall pay complainant \$2,860, as reparation, plus interest thereon at the rate of 13% per annum from January 1, 1983, until paid.

E. VEGA & SONS, INC., v. MERCEDES PRODUCE COMPANY. PACA
Docket No. 2-6194. Decided January 18, 1985.

Breach of contract—Reparation awarded.

G. Whitten, Presiding Officer
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$33,617.35 in connection with the sale by respondent, on complainant's behalf, of ten truck lots of yellow Granex-Grano onions in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. In addition, a copy of the complaint was served upon respondent which filed an answer thereto denying any liability to complainant.

Since the amount claimed in the formal complaint exceeds \$15,000, and complainant requested an oral hearing, a hearing was held in Mercedes, Texas on July 12, 1983, at which neither party was represented by counsel. Neither party filed briefs or claims for fees and expenses.

FINDINGS OF FACT

1. Complainant, E. Vega & Sons Inc., is a corporation whose address is 909 West Second Street, Mercedes, Texas.
2. Respondent, Mercedes Produce Company, is a corporation whose address is P.O. Box 31, Mercedes, Texas. At the time of the transactions involved herein respondent was licensed under the Act.
3. On or about May 20, 1981, complainant and respondent entered into the following agreement:

This agreement entered into this date of May 20, 1981 A.D. between Mercedes Produce Company, hereinafter known as shipper, and E. Vega & Sons, hereinafter known as grower.

INVESTMENT AGREEMENT:

Shipper: To furnish all facilities for the processing grading, drying, bagging and selling of Onions. Shipper shall have full control of disposal of product and will, to the best of his ability, endeavor to receive maximum returns for product. The charge for this service shall be 2.10 Per Bag. The shipper agrees to advance all U.S. harvesting cost for the account of the grower.

Net F.O.B.: The shipper shall deduct from gross sale all expenses incurred in the delivery of product. This includes, in the event that there are, all freight, brokerage, inspection at destination, and any other expenses incurred in delivery of Onions.

Availability of records: The grower shall have full authority to all records and shall be informed of any transaction regarding sales, any allowances or adjustments or quality problems of Onions at any time.

E. Vega & Sons
/S/ J. Rene Vega

Mercedes Produce Co.
/S/ Billy Pemelton

It was further agreed between the parties that respondent would perform any mechanical drying of onions that was necessary by blowing heated air over the onions prior to shipment.

4. Between May 25, and June 6, 1981, complainant delivered to respondent ten trucklots containing approximately 13,000 field bags of Texas yellow Granex-Grano onions to be sold on complainant's behalf. The following table gives the date of delivery to respondent and the amount of pack-out per load:

Date:	Truck- lot No.:	Pack-Out:
5-25-81	1	465 prepack
		134 lg. med.
		110 jumbo
		10 boilers
		<hr/>

Volume 44 Number 1

Date	Truck- lot No.:	Pack-Out:
	719	
5-28-81	2	456 prepack 157 lg med. 129 jumbo <u>3</u> boilers
	745	
5-29-81	3	447 prepack 173 lg. med. <u>146</u> jumbo
	766	
5-30-81	4	575 prepack 258 lg. med. <u>180</u> jumbo
	1,013	
5-30-81	5	154 prepack 491 lg med. <u>149</u> jumbo
	794	
6-2-81	6	188 prepack 512 lg. med. <u>156</u> jumbo
	856	
6-3-81	7	193 prepack 895 lg med. <u>324</u> jumbo
	1,412	
6-4-81	8	538 prepack 634 lg. med. <u>317</u> jumbo
	1,489	
6-5-81	9	378 prepack 480 lg. med. <u>667</u> jumbo
	1,525	
6-6-81	10	892 prepack 577 lg. med.

Date	Truck- lot No..	Pack-Out:
	<u>432</u>	jumbo
	1,901	

5. During the latter part of the harvest period there were substantial rains which caused the onions to be wet and to be in need of drying. Respondent did not dry any of the onions.

6. Respondent rendered the following accounting to complainant covering the disposition of 10,892 sacks of the onions. The column showing "Ave. Gross Per Sack" was computed by us and added to the accounting.

Volume 44 Number 1

Date	Receiver	File #	Total Sacks	Avg. Gross Per Sack	Gross Recd	Freight	Brokerage	Net Received
5/27/81	C. H. Robinson	269	708	8.42	5,963.80			5,963.80
5/27/81	Cash Sale	272	2	11.50	23 00			23 00
5/28/81	Cash Sale	273	286	8.02	2,295 00			2,295 00
5/29/81	Casey Woodyk	276	382	7.31	2,792.42			2,792.42
5/30/81	White & Bush	279	385	10.11	3,892.50		45 00	3,847.50
5/30/81	C. H. Robinson	281	875	6.99	6,118.75			6,118 75
5/30/81	Brodrick Produce Co.	283	50	9.25	462.50	62 50	7.50	392 50
5/30/81	Various	284	310	9.40	2,917.00	332 00	46.50	2,538.50
6/1/81	Caro Produce Co	286	375	8.14	3,055.25		61 50	2,993.75
6/2/81	Various—Palmer	288	850	11.16	9,487.50	1,062 50	127.50	8,297 50
6/3/81	Casey Woodyk	291	825	7.31	6,030.75	1,320 00		4,710 75
6/3/81	Davis Distributing Co.	292	150	12.75	1,912.50			1,612 50
6/3/81	Cash Sale	293	250	8.40	2,100.00			2,100 00
6/3/81	Red's Market Inc.	294	69	9.82	678 00		10.35	667 65
6/4/81	J & J Produce Co.	295	115	9.52	1,095 00		17.25	1,077 75
6/3/81	McCartney Produce Co	298	365	8.18	2,986 25	456.25	45.00	2,485.00
6/4/81	Port City Produce Co.	299	100	13.25	1,325 00	125.00	15 00	1,185.00
6/5/81	Sweeny & Co	300	50	9.00	450.00		7.50	442 50
6/5/81	Casey Woodyk	303	800	1.60	1,280.00	1,280 00		—0—
6/5/81	Caruso Ciresi	304	80	9.00	720 00	144 00	12.00	564 00
6/6/81	Red's Market Inc	307	57	9.79	558 50		8 55	549.95
6/6/81	Davis Distributing Co.	308	400	.87	348 00			348.00
6/6/81	Various	309	444	.966	429.00		66.60	362.40
6/8/81	Various	311	150	.00	—0—	239 50	23.25	(262 75)
6/6/81	Gulf Provisions Co.	312	165	3.00	495.00		24.75	470 25
6/8/81	Rogers Produce Co	313	38	9.39	357.50			357 50
6/8/81	Biggers Bros, Jr	314	200	.00	(7 59)		30.00	(37.50)
6/8/81	Casey Woodyk	315	800	1.60	1,280 00	1,280.00		—0—

7. Federal inspections at destination were made as to only three of the shipments made by respondent. The Federal Inspection Certificate covering respondent's File No. 303 reads in relevant part as follows:

MARKET:	Hudsonville, Michigan
DATE	June 8, 1981; HOUR: 2:50 P.M.
RECEIVER:	Casey Woodwyk, Inc.; ADDRESS: Hudsonville, Michigan
.	
Lot Inspection .	Applicant's warehouse
WHERE INSPECTED.	
. . .	
Products Inspected:	Yellow Granex-Grano type ONIONS in mesh sacks printed, "Top Notch, Texas Onions, Net, Wt., 50 lbs., Produce of U.S.A., Mercedes Produce Co., Mercedes, Texas." Applicant states 800 sacks "Repak size "
Condition of Load:	Stacked at above location in tote boxes
. . .	
Temperature of Product.	Temperatures range from 68 to 70°F
. . .	
Condition:	Mostly firm. Most bulbs dry, many damp Decay ranges from 17 to 27%, average 20%, Bacterial Soft Rot in various stages mostly advanced, affecting from 1 to all scales.
. . .	
Remarks:	Applicant states lot 469.

The Federal Inspection Certificate covering respondent's File No. 315 reads in relevant part as follows:

MARKET:	Hudsonville, Michigan;
DATE:	June 11, 1981; HOUR: 2 00 P.M.

RECEIVER: Casey Woodwyk, Inc.; ADDRESS: Hudsonville, Michigan

Lot Inspection . . . Applicant's warehouse
WHERE INSPECTED:

. . .

Products Inspected: Yellow GRANEX-Grano Type ONIONS
in mesh sacks printed, "Top Notch,
Texas Onions, Mercedes Produce Co.,
Mercedes, Texas, Produce of U.S.A.,
Net Wt. 50 lbs." Applicant states 800
sacks "Repak size."

Condition of Load: Stacked at above location on pallets

. . .

Temperature of Product: Temperatures range from 68 to 70°F.

. . .

Condition: Mostly firm and dry, many damp.
Decay ranges from 20 to 37%, average 14%,
Bacterial Soft Rot in various stages,
mostly advanced, affecting 1 to all scales.

. . .

Remarks: Applicant states lot 473.

The Federal Inspection Certificate covering respondent's File No. 316 reads in relevant part as follows:

MARKET: Birmingham, Alabama

DATE: June 10, 1981; HOUR: 9:15 A.M.

APPLICANT: Magic City Produce Company, Inc; ADDRESS: Birmingham, Alabama

.

TRAILER LIC.: T3574; KIND: Mechanical; WHERE INSPECTED: Applicant's warehouse

Condition of Equipment	Temperature controls in operation.
Products Inspected	Yellow Grano-Granex ONIONS in open mesh sacks marked: "Top Notch, Texas Onions, net wt 50 lbs, Merced-ed Produce Co., Mercedes, Texas " Ap-plicant's count 800 stacks.
Condition of Load:	Through load, lengthwise-crosswise 7 rows, 7 layers
Temperature of Product:	Near rear doors Top 60°F, Bottom 60°F
Condition:	Mostly firm and dry. Decay 12 to 34% average 23% Bacterial Soft Rot in various stages affecting 1 outer scale to entire bulb
Remarks:	Load made accessible for inspection for applicant.

8. An informal complaint was filed on July 27, 1981, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant made a number of allegations (for instance the charge that respondent was liquidating inventory on a last in, first out basis) which we have deemed to be not supported by a preponderance of the evidence submitted in this proceeding. Consequently we see no necessity of discussing these allegations in detail. However, the major allegation made by complainant, namely, that toward the latter end of the harvest there were severe rains, and that respondent, having contracted to dry the onions when necessary, failed to dry such onions, is amply supported by the evidence.

The contract stated in relevant part that respondent was "to furnish all facilities for the processing, grading, drying, bagging and selling of onions." In addition respondent states in its answer that "the contract required respondent to maintain facilities for the drying of onions, but did not require that such onions be dried unless necessary." This, of course, amounts to an admission that respondent was obligated to dry complainant's onions when necessary.

There was sufficient testimony at the hearing to establish conclusively that there were rains of a severe nature during the latter part of the harvest period. Not only did complainant so testify, but

respondent's Bob Cowgill, sales manager for respondent firm, confirmed this fact. Mr. Cowgill stated in response to questioning by Mr. Vega as follows:

Now, I am going to take—like you said it has been 3 years ago. If I remember correctly, I think we stopped on—we run the last 2400 bags out of that field on a Saturday afternoon. I recall the Wednesday before that making the remark to you that we had a very, very delicate and sick onion. And I said, it looks like they are tremendously wet—they have been rained on.

Later the following dialogue took place between complainant and Mr. Cowgill:

Do you recall telling me that we had problems at the latter part, or at the tailend (sic) of the season—or was it right in the middle, or was there 2,400 bags left to be packed, or was there 4000 or 5000 bags still—yet to be packed out?

A. I don't recall. I think—I know the last few days we had some probles.

Q. The last 3000 bags?

A. I don't know. I don't recall the exact number.

Q. Could it have been the last 8000 bags?

A. It could have been; I don't know.

In regard to the factual question of whether the onions were ever mechanically dried as called for by the contract, Mr. Cowgill made the following admission:

Q. Okay, sir. Do you recall any one of there (sic) onions having been dried mechanically?

A. No.

Q. None of them were dried—

A. Not that I recall.

Respondent's Mr. Cowgill attempted to justify the failure to dry by maintaining that drying would have done no good:

Q. Have you ever used your mechanical dryer at the shed, sir?

A. Yes we have used it on occasion.

Q. Did you use it this year, sir?

A. Yes, we used it some.

Q. Did it prolong the life of the onions, sir?

A. That is hypothetical; I don't know. If I dry an onion and ship it, I don't know whether it arrived in the same condition if I hadn't dried it and ship (sic) it.

Q. So you know whether my onions if they had been dried would have arrived at its (sic) destination better off than they did—the way you reported them—hypothetically speaking?

A. Rene, when you get excessive moisture—now there were several times that you and I talked I would pick up an onion and say these are kind of wet. Did you have a rain? And you would say, yes we had a little shower. If I recall in the early part of your testimony here, you mentioned something about torrential rains up there?

Q. We did, sir.

A. When you have a rain and you get a wet onion in the field it has a tendency to activate decay. Now when you activate decay, there is no dryer in the world that is going to rectify that decay—no dryer.

We conclude that respondent's failure to mechanically dry the wet onions from the latter end of the harvest period was a breach of its contract with complainant.

Agriculture Handbook No. 208, *Onion Diseases and Their Control* (Agricultural Research Service, U.S.D.A. 1961, pp 22-23) states in regard to the disease bacterial soft rot as follows:

Bacterial soft rot usually starts at the neck of the bulb, and progresses down one or more scabs. Sometimes bulbs in the field are slightly affected before harvest. At first the tissue is water-soaked; later it disintegrates into a soft, slimy mass. . . . The decay does not spread readily from scale to scale. When the rot affects only one or two inner scales, as it often does, the only external sign of the disease is the lack of firmness of the bulb and often the appearance of a watery exudate through the neck when pressure is applied to the upper part of the surface of the bulb. . . . The organism enters only through wounds and only in moist environment. . . .

The precautionary measure already recommended regarding harvesting, curing, and storing should be followed carefully.

The following statements from the same handbook, under the heading "Curing and Storing" are said to be applicable to onions "[i]n northern sections", but only because such are "likely to encounter moist weather during the harvest period." Although the curing described is referred specifically to storage onions, similar curing by dry heated air could be expected to have the same effect of "permanently check[ing]" bacterial soft rot:

In northern sections where the crop is likely to encounter moist weather during the harvest period, thorough and prompt curing of the bulbs is extremely important. Since onions in this area are commonly held in storage for distribution during the winter months, well insulated storage houses are essential. Modern storages are also provided with a forced ventilating system wherein air is introduced at frequent intervals beneath bins in which bulbs are usually stored in bulk. Provision is made whereby air can be heated, if necessary. *With this system, the bulbs are usually put into storage directly from harvest and air circulation is begun at once. The circulation is continued for several days until the outer scales and the neck tissue are thoroughly dry. If this curing process is carried out promptly and thoroughly, incipient infections of neck rot and bacterial soft rot are permanently checked . . .* Id. at 20. (emphasis added)

Similar information is given in a standard textbook on plant pathology:

BACTERIAL SOFT ROT OF VEGETABLES

* * * * *

Disease cycle Wounds are the most common avenues of infection. Harvest bruises, freezing injury, and insect wounds are frequent predisposing factors. The organisms live over in the soil and in decayed refuse. Abundant moisture at the surface of the tissue, where wounds are present, is essential for invasion. . . . After infection has taken place, fairly high relative humidity is essential for progress of the disease. When decaying roots or tubers are placed in a dry atmosphere, the rotted tissue dehydrates

rapidly, and further advances of the disease may be checked completely.

* * * * *

Control Insofar as soft rot of storage vegetables is concerned, the chief means of control have to do with handling of the crop at harvest. Bruising of plant parts should be avoided. Provision should be made for healing of wounds and for drying of surfaces. . . .¹

The extensive instructions regarding drying of onions in the Department's Handbook 66, *The Commercial Storage of Fruits, Vegetables, and Florist and Nursery Stocks*, (Agricultural Research Service, 1977) should also be consulted. It is reasonable to conclude that the extremely low returns from the later sales of onions, as reflected in the average gross per sack in Finding of Fact 6, were due to deterioration resulting from the shipment of onions that has not been properly dried. Complainant is entitled to damages resulting from respondent's breach.

There were ten lots of the onions that sold for gross proceeds per sack of \$3.00 or less. The lowest gross proceeds for any of the other lots of onions were \$6.13 per sack, and the average gross proceeds for all of the other lots of onions were \$8.6577 per sack. Each of the ten lots of onions which produced the abnormally low proceeds were shipped June 5, 1981, or later; in other words at the latter end of the harvest period. In fact, as the table in Finding of Fact 6 shows, the lots that produced the low proceeds dominate the last few days during which shipments were made.

The measure of damages in this case is the difference between the amounts actually realized from the sale of the ten lots of onions, and the amounts which would have been realized had the onions been delivered in normal condition. As an indication of the latter value we will accept the prices for which respondent originally sold each of the ten lots of onions where sales, as opposed to consignments, were made, and such sales figures are known. Where the lots were sold on a consignment or similar basis we will use the average of the amounts realized by respondent on those lots which sold for gross proceeds above \$3.00 per sack. See *Trans-West Fruit Co., Inc. v. Ameri-Cal Produce, Inc.*, 42 Agric. Dec. ____ (1983).

For File No. 303, covering 800 sacks of onions, the record does not reveal the original sale price if any. At \$8.6577 per sack the

¹ John Charles Walker, *Plant Pathology*, 3rd ed. 1969.

gross proceeds which should have been realized from the sale of these onions amount to \$6,926.16. The gross proceeds actually realized from the sale of these onions amounted to \$1,280.00. The difference between these two amounts, or \$5,646.16, constitutes complainant's damages as to File No. 303. The freight, in the amount of \$1,280.00 applicable to this load, was previously deducted when respondent accounted to complainant.

For File No. 308, covering 400 sacks of onions, the Department's report of investigation reveals that the original sale price was \$11.75 per sack. Using this figure, the gross proceeds which should have been realized from the sale of these onions amounts to \$4,700.00. The gross proceeds actually realized from the sale of these onions amounted to \$348.00. The difference between these two amounts, or \$4,352.00, constitutes complainant's damages as to File No. 308. There were no freight or brokerage charges relative to this load.

For File No. 309, covering 444 sacks of onions, the record does not reveal the original sale price if any. At \$8.6577 per sack the gross proceeds which should have been realized from the sale of these onions amount to \$3,844.02. The gross proceeds actually realized amounted to \$429.00. The difference between these two amounts, or \$3,348.42, constitutes complainant's damages as to File No. 309. The brokerage, in the amount of \$66.60, applicable to this load, was previously deducted when respondent accounted to complainant.

For File No. 311, respondent on its accounting showed the number of sacks as 150. However, the Department's report of investigation reveals that the actual number of sacks in this lot was 205. The report of investigation also reveals that this lot was consigned. At \$8.6577 per sack the gross proceeds which should have been realized from the sale of these onions amount to \$1,774.83. No gross proceeds were in fact realized from the sale of these onions. The freight in the amount \$239.50 and the brokerage in the amount of \$23.25 were both previously deducted when respondent accounted to complainant. Complainant's total damages as to File No. 311, therefore, amount to \$1,774.83.

For File No. 312, covering 165 sacks of onions, the Department's report of investigation reveals an original sale price of \$13.00. At \$13.00 per sack the gross proceeds which should have been realized from the sale of these onions amount to \$2,145.00. The gross proceeds actually realized from the sale of these onions amounted to \$495.00. The difference between these two amounts, or \$1,650.00, constitutes complainant's damages as to File No. 312. The broker-

age in the amount of \$24.75 applicable to this load was previously deducted when respondent accounted to complainant.

For File No. 314, covering 200 sacks of onions, the record does not reveal the original sale price if any. At \$8.6577 per sack the gross proceeds which should have been realized from the sale of these onions amount to \$1,731.54. No gross proceeds were actually realized from the sale of these onions, but instead a deficit of \$7.59 was incurred which was previously deducted when respondent accounted to complainant. Accordingly this amount should be added to complainant's damages in this case. The brokerage in the amount of \$30.00 applicable to this load was also previously deducted when respondent accounted to complainant. Complainant's damages as to this load, accordingly, amount to \$1,739.13.

For File No. 315, covering 800 sacks of onions, the record does not reveal the original sale price if any. At \$8.6577 per sack the gross proceeds which should have been realized from the sale of these onions amounted to \$6,926.16. The gross proceeds reported by respondent from the sale of these onions amounted to \$1,280.00. The difference between these two amounts, or \$5,646.16, constitutes complainant's damages as to File No. 315. The freight in the amount \$1,280.00 applicable to this load was previously deducted when respondent accounted to complainant.

For File No. 316, the Department's report of investigation reveals a sale on an "open" basis. At \$8.6577 per sack the gross proceeds which should have been realized from the sale of these onions amounted to \$6,926.16. The gross proceeds actually realized from the sale of these onions amounted to \$668.00. The difference between these two amounts, or \$6,258.16, constitutes complainant's damages as to File No. 316. No freight or brokerage was incurred as to this load.

For File No. 319, covering 100 sacks of onions, the record does not reveal the original sale price if any. At \$8.6577 per sack the gross proceeds which should have been realized from the sale of these onions amount to \$865.77. The gross proceeds actually realized from the sale of these onions amounted to \$212.50. The difference between these two amounts, or \$653.27, constitutes complainant's damages as to File No. 319. No freight or brokerage was reported as to this load.

For File No. 321, covering 316 sacks of onions, the record does not reveal the original sale price if any. At \$8.6577 per sack the gross proceeds which should have been realized from the sale of these onions amount to \$2,735.83. The gross proceeds actually realized from the sale of these onions amounted to \$226.20. The difference between these two amounts, or \$2,509.63, constitutes com-

plainant's damages as to File No. 321. The brokerage in the amount of \$47.40 applicable to this load was previously deducted when respondent accounted to complainant.

The total damages from all of the ten lots of onions amount to \$33,577.63. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Neither party submitted a claim for fees and expenses, and consequently no award for such will be made.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, the amount of \$33,577.63, with interest thereon at the rate of 13 percent per annum from July 1, 1981, until paid.

DYNASTY FARMS INC., v. M. LEVIN & Co., INC. PACA Docket No. 2-6426. Decided January 18, 1985.

Rescission—Sale on consignment—Proceeds of sale—Failure to pay—Damages. Where complainant failed to prove that broker materially misrepresented facts concerning inspection, complainant is bound by his rescission of original contract. In sale on consignment by respondent, complainant is entitled only to proceeds of sale minus reasonable expenses. However, respondent is not relieved of indebtedness when complainant failed to make timely presentation of respondent's check, resulting in the check being rejected as stale.

Complainant, *pro se*.

William J. Fair, Springfield, Pennsylvania, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$6,300.10 in connection with a shipment of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure,

the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Respondent filed an answering statement. Complainant attempted to file a statement in reply, but it was not accepted because of its untimely submission. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Dynasty Farms Inc., is a corporation whose address is P.O. Box 1276, Salinas, California.

2. Respondent, M. Levin & Co. Inc., is a corporation whose address is 3301 S. Galloway St., Philadelphia, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On January 8, 1983, complainant sold to respondent a truckload of lettuce consisting of 944 cartons, with an initial price of \$6.65 per carton plus \$22.50 for a Ryan recorder, totalling \$6,300.10 f.o.b. The contract provided that complainant would protect the price against market decline through January 11, 1983, with the final price to be determined by the f.o.b. market price at which most similar lettuce was sold on that date. In the event that there was no such price, the final price would be split between the highest and lowest prices in the existing range. The contract did not specify any grade for the lettuce, nor did it state that conditions of bruising or discoloration following bruising were to be specifically excluded from any warranty. The Richard Kaiser Company Inc., Salinas, California, acted as the broker and confirmed the contract terms by means of a June 10, 1983, confirmation of sale which was sent to both parties.

4. The truckload of lettuce was shipped in interstate commerce to respondent, where it arrived on January 12, 1983, and was unloaded and accepted. The Ryan recorder showed that a temperature of from approximately 36° to 40°F. was maintained throughout transit. On January 12, 1983, after the lettuce arrived and was in the process of being unloaded, it was federally inspected with the following results, in relevant part:

Temperature of Product:	Various locations 38°F to 50°F.
Size.	Fairly uniform.
Quality:	Clean, fairly well trimmed, head leaves green color. Average 89% hard or firm, 11% fairly firm. No grade defects.

Condition	Head or portions of heads not affected by condition defects are fresh and crisp <i>Wrapper Leaves:</i> Damage by yellow to brown discoloration range 3 to 8 heads per carton, average 19%. Decay average 3% <i>Head leaves:</i> Damage by yellow to brown discoloration range 4 to 6 heads in most cartons, many none, average 13%. Damage by external Tipburn average 2% Decay average 2%.
Grade:	Meets quality requirements but fails to grade U.S. No. 1 only account condition.
Remarks:	Inspection made during process of unloading 10 stacks end of trailer.

5. Respondent conveyed the inspection results to the broker, which contacted complainant. The broker informed complainant that there were no transportation problems as indicated by the Ryan recorder. The broker did not inform complainant that the pulp temperature found by the inspection was from 38° to 50°F.

6. On either January 12 or January 24, 1983, complainant told broker that respondent was authorized to handle the lettuce on consignment.

7. On February 1, 1983, respondent sent complainant a statement stating that it had disposed of the lettuce as follows: 230 cartons at \$5.00 per carton, 712 cartons at \$4.00 per carton, 1 carton dumped, and 1 carton "Shml Unld. Deducted from Freight" for a total of \$3,998. From this figure, respondent subtracted \$2,822 for freight, \$42.00 for the inspection, \$599.70 for commission and \$141.60 for handling, a total of \$3,605.30, for a net return of \$392.70. This was paid to complainant by a check dated February 1, 1983, which was rejected by the bank as a "stale" check.

8. Respondent has not paid complainant any part of the \$6,300.10 which complainant claims to be due and owing.

9. A formal complaint was filed on August 22, 1983, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Complainant claims that it gave its consent to respondent to handle the lettuce on consignment based on a false report it re-

ceived from the broker on January 12, 1983. Complainant asserts that the broker said that a January 12, 1983, inspection, showing bad delivery, had indicated pulp temperatures of 38°F. bottom and 40°F. top when, in actuality, the inspection showed the pulp temperature at destination to be, at various locations, 38 to 50°F. Complainant contends that the consignment should thus be considered void and the original contract terms be given effect.

Respondent contends that it conveyed to the broker the transit temperature revealed by the Ryan tape as well as all the information revealed by the January 12, 1983, inspection, and believes that the broker accurately reported this information to complainant. In a sworn statement, the broker contends that it contacted complainant's employee on January 12, 1983, and upon "making him aware that there were no in-transit difficulties as indicated by the Ryan recorder, [complainant's] Mr. Russell did not want further details, just that Levin Company sell the load and we advise him of the results." According to the broker, it contacted complainant on January 24, 1983, stated that respondent's sales were very low, and proposed that respondent be permitted to handle the lettuce on consignment, to which complainant agreed.

Respondent states that the broker informed complainant of the pulp temperature revealed by the inspection. Complainant claims that the broker gave it the wrong pulp temperatures. The broker asserts only that it told complainant's employee that there were no in-transit difficulties as indicated by the Ryan recorder, and that complainant's employee did not want any further details. As the broker is presumed to be without bias, its version of events is usually accorded considerable weight. *La Mantia Cullum-Collier & Co., Inc. v. Brevard Produce Co., Inc.*, 40 Agric. Dec. 611 (1981). Therefore, we cannot conclude that there was any misrepresentation made to complainant of the condition of the lettuce when it arrived at respondent's place of business. Complainant's decision to authorize consignment handling was based on a true representation of all factual matters which complainant desired to know. Therefore, we will not consider the consignment herein to be void.

The results of respondent's sales are set forth in its February 1, 1983, statement to complainant, which shows 230 cartons sold at \$5.00 per carton, 712 cartons at \$4.00 per carton, one carton dumped, and one carton given the incomprehensible description "Shml Unld. Deducted From Freight", which must thus be considered as unaccounted for. These prices are reasonable, considering the condition of the lettuce. Therefore, the total proceeds are \$3,998.00 plus the value of the unaccounted for carton, which the January 12, 1983, Market News Service Reports for Philadelphia,

Pennsylvania shows to be from \$8.00 to \$10.00 per carton, of which we will use the \$8.00 figure. The gross proceeds were thus \$4,006.00. Respondent claims a net return of \$392.70, including several deductions (see Finding of Fact 7), all of which are reasonable except for the \$42.00 inspection fee, which is not properly deductible. Therefore, the net return to complainant should have been \$434.70.

Respondent claims to have paid complainant \$392.70 by virtue of check dated February 1, 1983. This check was returned by the bank as a "stale" check, apparently having been presented for payment by complainant after the time period stated on the check. However, this has no effect on respondent's indebtedness, as the failure of the payee such as complainant to make a timely presentment of a check does not served to discharge the drawer, respondent in this instance, unless the payor bank becomes insolvent during the delay. Uniform Commercial Code, Section 3-502(1)(b); *Robinson v. Brunson*, 383 So. 2d 964 (Fla. 1980); *Kaiser v. Northwest Shopping Center, Inc.*, 544 S.W. 2d 785 (Tex.1976).

Respondent's failure to pay complainant \$434.70 is a violation of Section 2 of the Act, for which reparation should be awarded with interest.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$434.70, with interest thereon at the rate of 13% per annum from February 1, 1983, until paid.

BUSHMAN'S INC. v. JAMES S. CLEMONS, JR. and JAMES S. CLEMONS, SR. d/b/a ORLANDO PRODUCE DISTRIBUTORS. PACA Docket No. 2-6383. Decided January 4, 1985.

Consignment sale—No dump certificate—Reparation awarded.

Andrew Y Stanton, Presiding Officer

Complainant, *pro se*.

Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,855.00 in con-

nection with the consignment of a load of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements as well as briefs. Complainant submitted an opening statement but respondent declined to submit any additional evidence. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Bushman's, Inc., is a corporation whose address is P.O. Box 167, Rosholt, Wisconsin.

2. Respondent, James S. Clemons, Jr. and James S. Clemons, Sr. d/b/a Orlando Produce Distributors, is a partnership whose address is 242 E. Grant, Orlando, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately October 5, 1982, complainant sold and shipped in interstate commerce to Morco Foods, Tampa, Florida, a load of potatoes consisting of 165 fifty pound cartons of U.S. No. 1, 80's at \$17 per carton, 435 fifty pound cartons of U.S. No. 1, 70's at \$17 per carton, and 100 one hundred pound sacks of utilities at \$6.05 per sack, for a total of \$5,705.00 f.o.b. Freight was prepaid in the amount of \$600.00.

4. Upon its arrival at Morco Foods on October 8, 1982, the load of potatoes was subjected to a federal inspection and rejected. The inspection found the following condition factors to be present:

Cartons 70's:	Mostly firm. From 6 to 31%, average 19% soft rot
80's:	Mostly firm From 8 to 14%, average 12% soft rot.
Sacks:	Generally firm. From 4 to 24%, average 10% soft rot
Each Lot:	Slimy Soft Rot, generally early, few ad- vanced stages.

5. After the rejection, complainant consigned the potatoes to respondent and shipped them to respondent's place of business. To date, respondent has never remitted anything to complainant, nor has it provided an account of sales or dump certificates.

6. A formal complaint was filed on June 22, 1983, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

This case involves a load of potatoes consigned to respondent by complainant. Respondent alleges in its unsworn answer that it did not receive the potatoes until October 12, 1982, at which time their condition was so poor that it could do nothing with them. Respondent apparently dumped the potatoes, but has not provided a dump certificate. Complainant admits that the potatoes were not in good condition, and were rejected by the original receiver, Morco Foods, Tampa, Florida, when they arrived on October 8, 1982. However, complainant denies that the potatoes were not delivered to respondent until October 12, 1982. Complainant is willing to give an allowance of \$5.50 per hundredweight (hereinafter, "cwt.") for the 700 cartons and \$2 per cwt. for the sacks, for a total of \$3,855.00.

As respondent was authorized to handle the potatoes on consignment, it had the duty to promptly and properly resell them, render an accounting to complainant, and pay over to complainant the net proceeds after deducting its necessary expenses incurred in the resale. *Stoops & Wilson, Inc. v. Wholesale Produce Exchange*, 41 Agric. Dec. 290 (1982). Although respondent apparently contends that the potatoes were dumped, it has not provided a dump certificate. This is in violation of 7 CFR § 46.23, which states that when produce is being handled for the account of another, proof of dumping more than five percent of the load shall be provided by means of a dump certificate. We, therefore, conclude that respondent was in breach of its duties as a consignee.

As damages resulting from its breach, respondent is liable for the value of the potatoes at the time of delivery less the expenses of a prompt and proper resale. *Meyer Tomatoes v. Hardcastle Produce Co., Inc.*, 40 Agric. Dec. 1172 (1981). Respondent claims in its unsworn answer that the time of delivery was October 12, 1982, four days after the potatoes arrived at Morco Foods about 100 miles from respondent's place of business. However, respondent has not presented any evidence to support this bare assertion. We thus find that time of delivery to respondent was approximately the date of arrival at Morco Foods, October 8, 1982. It is undisputed that, at that time, the potatoes were affected by soft rot and their value was not that of the prevailing market price for potatoes in

good condition. Therefore, we must estimate their value based on the difference between the market price, the contract price plus freight, and an amount determined by the degree of deterioration indicated by the federal inspection taken on October 8, 1982 (Finding of Fact 4). See *C. & G. Onion Company, Inc. v. Bushman's Inc.*, 40 Agric. Dec. 117 (1981). It is our conclusion that a deduction which would most accurately reflect the value of the potatoes would require doubling the percentage of soft rot found by the inspection, 12% for the 80's 19% for the 70's and 10% for the utilities, due to the effect of such rot on the surrounding potatoes. Therefore, from the 165 fifty pound cartons of 80's at a contract price of \$17 per cwt., or \$1,402.50, we will deduct 24%, leaving \$1,069.90; from the 435 fifty pound cartons of 70's at \$17 per cwt., or \$3,697.50, we will deduct 38%, leaving \$2,292.45; and from the 100 one hundred pound sacks of utilities at \$6.05 per cwt., or \$605.00, we will deduct 20%, leaving \$484.00. To the total, \$3,846.35, must be added the amount for freight which bears the same percentage to the \$600.00 freight expenditure as the \$3,846.35 does to the original f.o.b. contract price of \$5,705.00, or \$404.52. Therefore, the value of the potatoes at the time of delivery was \$3,846.35 plus \$404.52, or \$4,250.87. From this, we will deduct 15% to which respondent is entitled for commission and handling, or \$637.63, resulting in \$3,613.24, which respondent should have remitted for the consigned potatoes. Respondent's failure to do so is a violation of Section 2 of the Act for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$3,613.24 with interest thereon at the rate of 13 percent per annum from November 1, 1982, until paid.

JOS. CIMINO FOODS, INC. v. PRIME-PAC, INC. PACA Docket No. 2-6548. Decided January 18, 1985.

Failure to pay—Reparation awarded.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499A *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$6,120.00 in connection with two transactions, in interstate commerce, involving garlic, a perishable agricultural commodity.

Copies of the Department's report of investigation was served on both parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any further liability to complainant.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleadings of the parties were considered a part of the evidence in the case, as was the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements, but neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Jos. Cimino Foods, Inc., is a corporation whose mailing address is 95 Phelan Ave., Unit #1, San Jose, California 95112.

2. Respondent, Prime-Pac, Inc., is a corporation whose mailing address is 9 South Water Market, Chicago, Illinois 60608. At all material times, respondent was licensed under the Act.

3. On September 6, 1983, the respondent purchased a partial truckload of U.S. No. 1 quality garlic, on a delivered basis, from complainant, as follows:

Quantity	Commodity	Size	Unit Price	Amount
75	30 # Bulk Garlic	Jumbo	\$18.00	\$1,350.00
25	30 # Bulk Garlic	X-Jumbo	19.50	487.50
50	30 # Bulk Garlic	Colossal	21.00	1,050.00
25	5 # Bulk Garlic	Jumbo	3.00	75.00

Quantity	Commodity	Size	Unit Price	Amount
25	5# Bulk Garlic	Colossal	4 00	<u>100.00</u>
Total				\$3,062.50

The broker on the transaction was Rising Star Brokerage, Inc., 63 South Water Market, Chicago, Illinois 60608. On that same date, September 6, 1983, Rising Star Brokerage, Inc., issued a Confirmation of Sale which was sent to both parties. On September 9, 1983, complainant shipped the garlic described above to respondent by truck. Upon delivery thereof, the respondent received and accepted the same.

4. On October 6, 1983, in the course of interstate commerce, complainant sold a part truckload of U.S. No. 1 quality garlic to respondent, on a delivered basis, as follows:

Quantity	Commodity	Size	Brand	Unit Price	Amount
40	5# Bulk Garlic	Colossal	"Cimino"	\$4.25	\$170.00
25	5# Bulk Garlic	Jumbo	"Cimino"	3.50	87.50
20	30# Bulk Garlic	Colossal	"Cimino"	24.00	480.00
60	30# Bulk Garlic	X-Jumbo	"Murietta"	22.00	1,320.00
50	30# Bulk Garlic	Jumbo	"Cimino"	20.00	1,000.00
Total					<u>\$3,057.50</u>

The broker on the transaction was Rising Star Brokerage, Inc., 63 South Water Market, Chicago, Illinois 60608. On that same date October 6, 1983, Rising Star Brokerage, Inc., issued a Confirmation of Sale which was sent to both parties. On October 7, 1983, the complainant shipped, by truck, the load of garlic described above to the respondent which received and accepted the same.

5. A formal complaint was filed on March 12, 1984, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Before discussing the merits of this matter, we must note that the file in this case contained two separate complaints and two separate answers, i.e. each of the transaction described above had sep-

arate pleadings relating to it. Our conclusions discussed below relate to both transactions inasmuch as the two complaints are similar in nature, and the answer as to each complaint amounted to merely a general denial of the complainant's allegations.

The complainant alleges that the respondent purchased two partial loads of garlic but has since failed to make full payment. The complainant generally denies these allegations. Evidence in the record consists of a statement from Rising Star Brokerage, Inc., indicating that it, in fact, served as the broker with respect to these two transactions and otherwise supporting the complainant's allegations, the broker's Confirmations of Sale, the complainant's invoices sent to the respondent, and the bills of lading concerning the two shipments. On the basis of all of the evidence we find that the complainant sold the two partial truckloads of garlic to the respondent, and that respondent received and accepted the same, but has failed to make payment with regard to them. Respondent's failure to pay the complainant \$6,120.00 for these two partial truckloads of garlic are in violation of Section 2 of the Act for which reparation, plus interest, should be awarded.

ORDER

Within thirty (30) days from the date of this Order, respondent shall pay complainant \$6,120.00, as reparation, with interest thereon at the rate of 13% per annum from November 1, 1983, until paid.

Copies of this Order shall be served upon the parties.

MARK L. HANESS d/b/a C.J.'S BROKERAGE v. REX E. SPARKS
PRODUCE, INC. PACA Docket No. 2-6594. Decided January 18,
1985.

Modification of contract—Merchantability—Reparation awarded.

Dennis Becker, Presiding Officer.

Complainant, *pro se*

T.C. Bowen, Jr., Tazewell, Virginia, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$15,335.00 in connection with the

sale of four truckloads of potatoes in interstate commerce. Subsequently, an order for the payment of the undisputed amount of \$8,197.58 was issued, reducing the amount in controversy to \$7,137.42.

A copy of the Report of Investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement, and respondent filed an answering statement, to which complainant filed a statement in reply. Both parties were given the opportunity to file briefs, and respondent did so.

FINDINGS OF FACT

1. Complainant, Mark L. Haness is an individual doing business as C.J.'s Brokerage, with an address at 22706 Aspen St., Suite 301, Lake Forest, California.

2. Respondent, Rex E. Sparks Produce, Inc., is a corporation with an address at Route 1, Box 122A, Cedar Bluff, Virginia. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

3. On October 8, 1983, complainant sold to respondent a truckload of potatoes consisting of 1,000 packages of 5 by 10 pound U.S. No. 1 potatoes at \$3.50 per package or \$3,500.00, 200 cartons of potatoes at \$9.00 per carton or \$1,800.00, and 50 cartons of potatoes at \$18.00 per carton or \$900.00, for a total contract price of \$6,200.00, f.o.b. The potatoes were shipped in interstate commerce, and were received and accepted by respondent on October 12, 1983. As respondent began to unload the truck it noted that the potatoes were not as good as it expected. It immediately called complainant. It advised complainant as to the condition it found on the potatoes it had seen. Complainant asked respondent to handle the potatoes. Respondent did not wish to do so because it did not have room to sort the potatoes. Complainant prevailed upon respondent to handle them, with respondent promising that it would sort them as soon as possible. Respondent unloaded the rest of the potatoes, and placed them in its cooler until it was able to do something with them. On October 21, 1983, respondent looked at the potatoes

again, and determined that they were unmerchantable. It immediately got in touch with Luke Tapp, a representative of complainant, and discussed the matter with him. Mr. Tapp told respondent to have the potatoes inspected and dumped. Respondent did so. The inspection was held on October 22, 1983, by the Federal Inspection Service. It showed in pertinent part that "Most potatoes show various stages of Soft Rot mostly Slimy Soft Rot and/or serious damage by external discoloration". The Federal Inspection Service issued a Dumping Certificate with respect to the potatoes. Subsequently, respondent dumped the potatoes. It incurred expenses of \$90.00 for three trips by truck from its place of business to the dump, \$225.00 for checking the potatoes to ascertain whether they were merchantable, and \$102.00 for the inspection and dump certificate which were requested by complainant for a total cost of \$417.00. In addition, respondent paid freight from shipping point to its place of business for the load of potatoes. It computed that cost at \$420.42.

4. On October 24, 1983, complainant sold to respondent 280 cartons of potatoes at \$6.00 per carton for a contract price of \$1,680.00, and 575 five by ten pound bags of U.S. No. 1 potatoes at \$2.70 per bag for a contract price of \$1,552.50, and a total contract price of \$3,232.50, f.o.b. The potatoes were shipped to respondent in interstate commerce, where they were received and accepted by respondent.

5. On November 7, 1983, complainant sold to respondent 250 cartons of potatoes at \$8.75 for a contract price of \$2,187.50, 45 ten by five pound bags of U.S. No. 1 potatoes at \$7.00 for a contract price of \$315.00, and 550 five by ten pound bags of U.S. No. 1 potatoes at \$6.00 per bag for a contract price of \$3,300.00, and a total contract price of \$5,802.50, delivered. The potatoes were shipped to respondent in interstate commerce, where they were received and accepted by respondent.

6. On November 10, 1983, complainant sold to respondent 675 bags of 20 pound U.S. No. 2 potatoes at \$1.00 per bag for a contract price of \$675.00, and 200 five by ten pound bags of U.S. No. 1 potatoes at a price of \$4.00 per bag for a contract price of \$800.00, and a total contract price of \$1,475.00, delivered. Complainant paid respondent \$1,375.00 with respect to this transaction, deducting \$100.00 from the total contract price for checking the potatoes to determine whether they made good delivery. It ascertained that they did so.

7. An order was issued on August 10, 1984, in the amount of \$8,197.50 to cover the undisputed amount with respect to the four transactions involved in this proceeding, leaving for resolution the question as to whether respondent still owes \$7,137.42. The

\$8,197.58 covers the \$5,802.50 due and owing for the transaction set forth in Finding of Fact 5, above, and the \$3,232.50 due and owing for the transaction set forth in Finding of Fact 4, above, less the \$837.42 which respondent claims it suffered as damages with respect to the transactions set forth in Finding of Fact 3, above.

8. A formal complaint was filed in this proceeding on May 14, 1984, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

Although there are four transactions involved in this proceeding, in reality there are issues only with respect to the transactions which occurred on October 8, 1983, and November 10, 1983. With respect to the transactions which occurred on October 24, 1983, and November 7, 1983, there is no issue. Indeed, respondent has paid complainant what it is due for those two transactions less \$837.42 which it claims were damages it suffered with respect to the transaction which occurred on October 8, 1983.

With respect to the transaction that occurred on October 8, 1983, respondent accepted the potatoes when it partially unloaded the truck. *C.J. Prettyman, Jr., Inc. v. J.K. Packing Company*, 28 Agric. Dec. 1476 (1969). However, when it told complainant that the potatoes were in poor condition, complainant agreed to a modification of the contract. Respondent contends that complainant offered it full protection. Complainant claims that it got in touch with the shipper, Mountain View Produce, and conveyed to respondent that firm's request that respondent handle the potatoes to its best ability as quickly as possible. It makes no difference which of these versions of the discussion is more accurate. In either case complainant must prevail.

As soon as respondent agreed to handle the potatoes it asked complainant whether it should have the potatoes inspected. Complainant said it was not necessary. Therefore, there is no way to ascertain the true condition of the potatoes when they were received. Respondent claims that it stored the potatoes at 40°F. for the next 10 days, until they were inspected, and found to be unmerchantable. However, it has provided no proof as to the conditions under which they were stored. Under these circumstances we are unable to say that the potatoes were not merchantable when they were received, even though they were in very poor condition when they were inspected on October 22, 1983. When respondent agreed to handle the potatoes after claiming they were in poor condition it had a duty to dispose of them promptly. It was negligent when it allowed the 10 days to elapse prior to doing so. Thus, respondent is

liable for the full contract price of the potatoes because it has not shown that they were not merchantable when received and accepted.

Respondent also deducted \$100.00 from the total contract price of \$1,475.00 for the potatoes which it received as a result of the contract of November 10, 1983. It deducted this charge because it stated that it believed that the potatoes were in bad condition, and it cost that sum to ascertain that they were not. Respondent has made an improper deduction. It is not entitled to deduct incidental costs of this nature for making sure that the product is as warranted. Therefore, respondent must pay complainant \$100.00 with respect to this transaction.

Respondent has not paid complainant \$7,137.42 which is due to it as a result of the two transactions discussed above. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$7,137.42 with interest thereon at the rate of 13% per annum from December 1, 1983, until paid.

TOGNAZZINI SUPPLY, INC. *v.* CITY WIDE DISTRIBUTORS, INC. PACA
Docket No. 2-6419. Decided January 22, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$2,485.65 in connection with the sale of five partial truckloads of strawberries in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages

was less than \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement. Respondent filed an answering statement, and complainant filed a statement in reply. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Tognazzini Supply, Inc., is a corporation with an address at 1293 W. Stowell Road, Santa Maria, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Blvd., Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At one point Mr. Barnes agreed with Mr. Laite that respondent would advance money to City Wide Distributors of Arkansas for the purchase of produce since the latter corporation lacked operating capital. Respondent was also involved in transactions in which City Wide Distributors of Arkansas invoiced it for produce, and in other transactions in which it invoiced City Wide Distributors of Arkansas for produce.

4. With respect to each of the transactions involved in this proceeding Corry Brokerage of Memphis, Tennessee, acted as the broker. Corry Brokerage received the orders for the produce from Ralph Laite, Jr., in Lowell, Arkansas.

5. During the time of the transactions involved in this proceeding respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

6. On April 7, 1983, dealing through Corry Brokerage, complainant sold and shipped to respondent in interstate commerce 72 trays of strawberries at \$8.00 per tray plus \$.60 per tray for cooling, \$18.50 for tectrol, and \$.20 per tray for brokerage, for a total contract price of \$652.10, f.o.b. Corry Brokerage issued a Broker's Memorandum with respect to this transaction which showed that the respondent was the purchaser. Complainant issued an invoice which showed that the goods were sold to respondent. A bill of

lading was issued by complainant which showed that the goods were destined for delivery to respondent in Tulsa, Oklahoma. That bill of lading was signed by the truck driver. Respondent did not notify complainant until July 7, 1983, that it claimed it was not the purchaser.

7. On April 18, 1983, dealing through Corry Brokerage, complainant sold to respondent in interstate commerce 72 trays of strawberries at \$6.50 per tray plus \$.60 per tray for cooling, \$18.50 for tectrol, and \$.20 per tray for brokerage, for a total contract price of \$544.10, f.o.b. Corry Brokerage issued a Broker's Memorandum with respect to this transaction which showed that the respondent was the purchaser. Complainant issued an invoice which showed that the goods were sold to respondent. Complainant also issued a bill of lading which was signed by the truck driver which showed that the goods were destined for delivery to respondent in Tulsa, Oklahoma. Respondent did not notify complainant until July 7, 1983, that it claimed it was not the purchaser.

8. On May 2, 1983, dealing through Corry Brokerage, complainant sold to respondent in interstate commerce 72 trays of strawberries at \$6.50 per tray, plus \$.60 per tray for cooling, \$18.50 for tectrol, and \$.20 per tray for brokerage, for a total contract price of \$544.10, f.o.b. Corry Brokerage issued a Broker's Memorandum with respect to this transaction which showed that the respondent was the purchaser. Complainant issued an invoice which showed that the goods were sold to respondent. Complainant also issued a bill of lading which was signed by the truckdriver which showed that the goods were destined for delivery to respondent in Tulsa, Oklahoma. Respondent did not notify complainant until July 7, 1983, that it claimed it was not the purchaser.

9. On May 6, 1983, complainant sold to Vogel's, Inc., located in Little Rock, Arkansas, in interstate commerce, 192 trays of premium strawberries, f.o.b. When the goods arrived at destination 42 trays were unloaded by a subsequent purchaser. These trays were used by the buyer for its own purposes. Complainant issued an invoice which showed that respondent was the purchaser of the 42 trays.

10. On May 16, 1983, dealing through Corry Brokerage, complainant sold to respondent in interstate commerce 60 trays of strawberries at \$5.00 per tray, plus \$.60 per tray for cooling, \$18.50 for tectrol, and \$.20 per tray for brokerage, for a total contract price of \$366.50, f.o.b. Corry Brokerage issued a Broker's Memorandum with respect to this transaction which showed that the respondent was the purchaser. Complainant issued an invoice which showed that the goods were sold to respondent. Complainant also issued a

bill of lading which was signed by the truckdriver which showed that the goods were destined for delivery to respondent in Tulsa, Oklahoma. Respondent did not notify complainant until July 7, 1983, that it claimed it was not the purchaser.

11. A formal complaint was filed in this proceeding on July 25, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant contends that dealing through Corry Brokerage it sold to respondent in five transactions transpiring between April 7, 1983, and May 16, 1983, strawberries which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$2,485.65. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, therefore, could not bind it. Third, respondent says that there was no contract

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillee Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borrelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period of the transactions respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one tone (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of goods purchased in the 18 proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased produce totaling at least 2,000 pounds during the period April through June, 1983. In addition, the quantity of goods purchased in those 18 proceedings is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that respondent was, during the time of these transactions, "conducting a business requiring a license under the Perishable Agricultural Commodities Act." It based its conclusion on records in respondent's files which showed that there were out-of-state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the strawberries. Respondent has suggested that the strawberries were bought by City Wide Distributors of Arkansas. However, it acknowledged in its brief that at least for a short period of time it

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce in a year have been met.

had agreed to pay invoices on behalf of the Arkansas Corporation. This acknowledgment in its brief is inconsistent with respondent's claim in paragraph 6 of its Answering Statement that "At no time did I, personally or as an officer of the Respondent Corporation, guarantee the payment of invoices for produce ordered by the Arkansas Corporation." Corry Brokerage, of course, with respect to four of the five transactions involved herein, issued broker's memoranda which show that respondent was the purchaser. The above facts do not prove that respondent actually purchased and received the strawberries involved in this proceeding. However, they do show that there was a course of conduct on the part of the respondent on which both the broker and complainant relied, under which respondent undertook to make payment on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. As an ostensibly neutral third party in this proceeding, the word of the broker, as manifested by its memoranda, is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T.J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing broker's memoranda which show respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. We find nothing in this record which might give credibility to respondent's claim that Corry Brokerage and Mr. Laite were in collusion with each other to mislead sellers of produce. Therefore, based on the facts discussed above, we have no alternative other than to find the respondent was involved with respect to four of the five transactions involved in this proceeding.³

Having found that respondent was involved in four of the transactions we must determine whether it is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transactions herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least did not repudiate that relationship until almost two months after the last transaction occurred. Furthermore, respondent held itself out as the buyer to complainant, and did not repudiate that understanding until July 7, 1983. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by

³ The reasons one of the transactions is excluded is discussed below.

its action, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Park Hill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that none of the produce was ever delivered to it, we find based upon a preponderance of the evidence that in four of the five transactions respondent either actually received the goods or received constructive delivery of them. With respect to the four transactions in which Corry Brokerage issued a broker's memorandum of sale showing that respondent was the purchaser, complainant also issued an invoice showing that respondent was the purchaser, and complainant provided bills of lading signed by the truck drivers which showed that respondent was the purchaser. It is our conclusion that the evidence is sufficient to show that respondent did purchase the goods in those four transactions. With respect to the transaction which occurred on May 6, 1983, with shipment to Vogel's, Inc., in Little Rock, Arkansas, and an offloading of 42 trays of strawberries for a receiver known as City Wide, as manifested by the broker's memorandum issued by Corry Brokerage, we find that the evidence is not sufficient for us to conclude that respondent received the strawberries. Because the goods went to Arkansas rather than Oklahoma in the first instance, and the broker's memo showed Vogel's was the purchaser, it is likely that they were received by City Wide Distributors of Arkansas rather than respondent. Neither is it clear that Vogel's was not responsible for payment for those strawberries. Therefore, it is our conclusion that complainant has failed to sustain its burden of proof that respondent purchased and received those strawberries.

We are particularly impressed in the four transactions in which we have found that respondent was the purchaser with the fact that invoices and broker's memoranda were sent to respondent approximately at the time the transactions occurred. Presumably, respondent received copies of the invoices and the broker's memorandum of sale. At least it never denied that it did. If respondent were

truly not involved in these transactions, it should have notified both those parties immediately upon receipt of the documents that it did not receive or accept the produce. Otherwise, its failure to do so was misleading to both. Rather than do this, respondent did not take any action to deny the existence of these contracts until July 7, 1983, when its attorney, Mr. Leslie S. Hauger, Jr., sent a general notice to creditors that it would not be liable for obligations which it stated were those of City Wide Distributors of Arkansas. This was three months after the first transaction occurred, and almost two months after the last transaction occurred. This is simply too late for respondent to deny its involvement with respect to the several transactions. Immediate action would have permitted complainant and Corry Brokerage to avoid further sales, and secondly, to try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent has not paid complainant \$2,106.80 with respect to four of the five transactions discussed above. Based upon our discussion, above, we find the respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$1,196.20 with interest thereon at the rate of 13% per annum from May 1, 1983, until paid. Furthermore, within 30 days from the date of this Order respondent shall pay to complainant, as reparation, \$910.60, with interest thereon at the rate of 13% per annum from June 1, 1983, until paid.

HENRY T. JACOBS v. KOSTER ENTERPRISES PRODUCE PACKING DIVISION, INC. and/or CALIFORNIA MARKETING OF BAKERSFIELD, INC.
PACA Docket No. 2-6531. Decided January 22, 1985.

Brokerage fee—Agent—Dismissed.

Andrew Y. Stanton, Presiding Officer.

Complainant, *pro se*.

Thomas R. Oliveri, Newport, California, for respondent. California Marketing of Bakersfield, Inc.

Jay L. Michaelson, Santa Barbara, California, for respondent. Koster Enterprises Produce Packing Division, Inc.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$705.00, in connection with three shipments of carrots in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon each respondent. Respondent California Marketing of Bakersfield, Inc. filed an answer thereto, denying liability. Respondent Koster Enterprises Produce Packing Division, Inc. submitted evidence that it had filed a voluntary petition in bankruptcy. Therefore, an order was issued on May 9, 1984, staying the proceeding against respondent Koster Enterprises Produce Packing Division, Inc.

Since the amount claimed as damages does not exceed \$15,000.00 the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and the answer of California Marketing of Bakersfield, Inc. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement and California Marketing of Bakersfield, Inc. submitted an answering statement. California Marketing of Bakersfield, Inc. also filed a brief.

FINDINGS OF FACT

1. Complainant, Henry T. Jacobs, is an individual whose address is 2575 Palisade Avenue, Bronx, New York.

2. Respondent, Koster Enterprises Produce Packing Division, Inc. (hereinafter, "Koster"), is a corporation whose address is Box 32, Cuyama, California. At the time of the transactions involved herein, Koster was licensed under the Act.

3. Respondent, California Marketing of Bakersfield, Inc. (hereinafter, "California Marketing"), is a corporation whose address is Box 9831, Bakersfield, California. At the time of the transactions involved herein, California Marketing was licensed under the Act.

4. On approximately November 15, December 1, and December 14, 1982, complainant, acting as a broker, arranged for the sale from Koster to various buyers of certain quantities of produce, in interstate commerce. Complainant was to receive brokerage totaling \$705.00. During the course of these transactions, complainant never communicated with Koster directly, but dealt with California Marketing, Koster's representative.

5. No problems were reported to complainant regarding these three transactions. Koster invoiced the buyers and the buyers remitted the full invoice prices to Koster.

6. Subsequent to the occurrence of the three transactions, complainant prepared confirmations of sale showing that California Marketing was the seller of the produce involved. However, complainant did not send the confirmations to California Marketing.

7. At various times subsequent to the occurrence of these three transactions, complainant spoke with California Marketing about his claim for \$705.00 in brokerage fees. California Marketing never acknowledged liability for such fees.

8. In a June 7, 1983, letter to Koster, complainant demanded payment for brokerage of \$705.00. The letter referred to a previous invoice sent to Koster. No reference was made in the letter to California Marketing.

9. An informal complaint was filed on June 30, 1983, which was within nine months from when the alleged cause of action herein accrued. A formal complaint was filed on December 5, 1983.

10. On May 9, 1984, an Order was issued by the Department staying this reparation proceeding against Koster because of its filing of a voluntary petition in bankruptcy in the United States Bankruptcy Court, Central District of California, cases LA-84-00019 and 00020.

CONCLUSIONS

Before discussing the merits of the case, it must first be stated that the liability of Koster will not be discussed herein, as all reparation proceedings against it under the Act have been stayed because of its filing of a petition in bankruptcy. An Order was issued

by the Department on May 9, 1984, reflecting this (Finding of Fact 10). Therefore, Koster's liability will be determined at a later date, when the stay is lifted. California Marketing is not affected by this stay, and its liability to complainant will, therefore, be determined herein.

Complainant alleges that respondents, in the alternative, are liable for brokerage fees totaling \$705.00 in connection with three transactions involving sales of produce from respondents to certain buyers, with respect to which complainant acted as the broker. California Marketing denies liability, contending that it was merely the selling agent for Koster and incurred no obligation to pay brokerage.

Complainant, as the moving party herein, has the burden of proving the contract terms, the breach thereof by California Marketing, and the resulting damages, by a preponderance of the evidence. *New York Produce Trade Association, Inc. v. Sidney Sandler*, 32 Agric. Dec. 702 (1973).

Complainant has submitted sworn statements asserting that when the transactions occurred, California Marketing represented itself as the sole seller. Complainant states that it prepared confirmations of sale on November 15, December 1, and December 14, 1982, which show this. However, this is refuted by California Marketing, as its president has also submitted a sworn statement in which he claims that in his dealings with complainant, he always made clear that his firm was acting as a representative of Koster, and not as the seller. Further, he denies ever receiving any of complainant's confirmations of sale until after the institutions of this reparation proceeding. Complainant also asserts that during January, February, March, and April 1983, he spoke to California Marketing about his brokerage claim, and that California Marketing said that it had not yet been paid its selling fee by Koster, in which complainant's brokerage payment was included. Complainant claims that California Marketing suggested that complainant contact Koster for payment of his brokerage, which complainant did through his letters of May 15 and June 7, 1983. Although the alleged May 15, 1983, letter is not part of the record, the June 7, 1983, letter is in evidence, and consists of a demand by complainant to Koster for the payment of brokerage. This seems inconsistent with complainant's assertion that California Marketing was the seller. Further, the letter makes no reference to California Marketing's alleged suggestion that complainant request brokerage from Koster directly. Complainant's current position also appears to be inconsistent with the contention in his informal complaint that Koster invoiced the buyers for the transactions at issue, and that

the buyers made full remittance to Koster. We believe the preponderance of the evidence indicates that California Marketing's role was merely that of a seller's agent, with no liability for the payment of brokerage. The complaint against California Marketing must, therefore, be dismissed.

ORDER

The complaint against California Marketing of Bakersfield, Inc. is hereby dismissed.

The complaint against Koster Enterprises Produce Packing Division, Inc. is unaffected by this Decision.

BUD ANTLE, INC. v. EMERSON H. ELLIOTT d/b/a EMERSON ELLIOTT PRODUCE. PACA Docket No. 2-6699. Decided January 22, 1985.

Admission of indebtedness—Reparation awarded.

Andrew Y. Stanton, Presiding Officer
Complainant, *pro se*.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$49,167.05 in connection with a shipment of produce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to Section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Bud Antle, Inc., is a corporation whose address is P.O. Box 1759, Salinas, California 93902. Respondent, Emerson H. Elliott d/b/a Emerson Elliott Produce, is a individual whose address is P.O. Box 745, Casselberry, Florida 32707. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of Section 2 of

the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$49,167.05. Accordingly, within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$49,167.05, with interest thereon at the rate of 13 percent per annum from October 1, 1984, until paid.

JOE PHILLIPS, INC. v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6485. Decided January 23, 1985.

Apparent agency—Constructive deliver, inaction on part of respondent—

Damages—Broker's statements.

Where respondent allowed seller of produce to believe that broker was respondent's agent, respondent was bound by the actions of the broker. Further, the fact that respondent failed to notify the complainant that the fact that respondent failed to notify the complainant that it did not receive or accept the goods, but waited at least two months, estopped him from claiming that it never received the goods.

Dennis Becker, Presiding Officer

Thomas R. Oliver, Newport Beach, California, for complainant.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$11,874.75 in connection with the sale of seven truckloads of potatoes in interstate commerce.

A copy of the Report of Investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement, and respondent filed an answering statement. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant Joe Phillips, Inc., is a corporation with an address at 1617 West Shaw, Suite A, Fresno, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Boulevard, Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At least immediately prior to the time of the transactions involved in this proceeding, and possibly when they occurred, respondent admitted that "upon receipt of invoices for produce allegedly purchased by the Arkansas Corporation, the undersigned requested the Respondent Corporation to pay such invoices, and to then invoice the Arkansas Corporation for the sums advanced. . . . However, when the Arkansas Corporation failed to reimburse the Respondent Corporation, this practice was terminated." (Paragraph 7 of Answering Statement). However, respondent did not make any statement in the record as to when or how the practice of making such payments was terminated.

4. With respect to each of the transactions involved in this proceeding Corry Brokerage of Memphis, Tennessee, acted as the broker. Corry Brokerage received the orders for the produce from Ralph Laite, Jr. in Lowell, Arkansas. It did so on the authority of Kenneth Barnes, who told Corry Brokerage that he "would handle the financial end and direct sales from the Tulsa location." (Report of Investigation).

5. Prior to the transactions involved in this proceeding complainant dealt with respondent through Corry Brokerage in a transaction which occurred on March 22, 1983, and involved the sale of potatoes. Corry Brokerage issued a broker's memorandum of sale which showed that respondent was to receive the goods. On April 15, 1983, respondent issued a check to complainant in the sum of \$1,817.50, the exact amount which was involved in that transaction.

6. During February, March, April, May, and June 1983, respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act. It discontinued its activities of dealing in fresh fruits and vegetables during the month of August 1983. (Report of Investigation).

7. On April 13, 1983, dealing through Corry Brokerage, complainant sold to respondent 100 100 pound sacks of US No. 2 Baker potatoes at \$4.50 per sack for a contract price of \$450.00 and 50 cartons of 60 count Russet potatoes at \$21.50 per carton for a contract price

of \$537.50, and a total contract price of \$987.50, f.o.b. Corry Brokerage issued a broker's memorandum with respect to this transaction which showed that the respondent was the purchaser. However, the broker's memorandum reflected only the 100 sacks of No. 2 Russet potatoes, and showed a price of \$5.00 per sack. Complainant issued an invoice on April 14, 1983, which showed that the goods were sold to respondent. Respondent did not complain until after the reparation complaint was filed that it was not the purchaser.

8. On April 19, 1983, complainant sold to respondent potatoes of various sizes and quantities, at various prices, for a total contract price of \$3,768.75, f.o.b. Corry Brokerage issued a broker's memorandum of sale which reflected that the goods were ordered by respondent. On April 20, 1983, complainant issued an invoice which showed that respondent was the purchaser of the potatoes. Respondent did not complain until after the reparation complaint was filed that it was not the purchaser.

9. On May 5, 1983, complainant sold various quantities and types of potatoes at various prices to respondent, for a total contract price of \$2,607.50, f.o.b. Corry Brokerage issued a broker's memorandum of sale which showed that respondent was the purchaser. On May 6, 1983, complainant issued an invoice which showed that respondent was the purchaser. Respondent did not complain until after the reparation complaint was filed that it was not the purchaser.

10. On May 11, 1983, complainant sold to respondent various quantities and types of potatoes at different prices, for a total contract price of \$1,872.50, f.o.b. Corry Brokerage issued a broker's memorandum of sale which showed that City Wide Distributors located in Tupelo, Mississippi, was the purchaser. On May 12, 1983, complainant issued its invoice which showed that respondent, located in Tulsa, Oklahoma was the purchaser. Respondent did not complain until after the reparation complaint was filed that it was not the purchaser.

11. On May 18, 1983, complainant sold to respondent various quantities of various sizes of potatoes at different prices, for a total contract price of \$1,862.50, f.o.b. Corry Brokerage issued a broker's memorandum of sale which showed that respondent was the purchaser. On May 31, 1983, complainant issued an invoice which showed that respondent was the purchaser. Respondent did not complain until after the reparation complaint was filed that it was not the purchaser.

12. On May 26, 1983, complainant sold to respondent various quantities of various types of potatoes at different prices for a total contract price of \$350.00, f.o.b. Corry Brokerage issued a broker's

memorandum of sale which showed that respondent was the purchaser. On May 31, 1983, complainant issued an invoice which showed that respondent was the purchaser. Respondent did not complain that it was not the purchaser until after the reparation complaint was filed. There was also issued with respect to this transaction by complainant a bill of lading which showed that the potatoes were destined for respondent.

13. On June 2, 1983, complainant sold 60 cartons of potatoes of various types to respondent at \$7.10 per carton for a total contract price of \$426 f.o.b. On June 2, 1983, complainant issued its invoice which showed that the potatoes were sold to respondent. Respondent did not complain that it was not the purchaser until after the reparation complaint was filed. There was also issued by complainant a bill of lading which showed that the goods were destined for respondent in Tulsa, Oklahoma.

14. A formal complaint was filed in this proceeding on December 28, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

This is one of eighteen similar proceedings involving the respondent City Wide Distributors, Inc.¹ In this proceeding complainant

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co v City Wide Distributors, Inc, PACA Docket No. 2-6
Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc v City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baille Co., Inc. v City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.* PACA Docket No. 2-6440; *Bull & Price, Inc a/t/a Allan B Produce v. City Wide Distributors, Inc*, PACA Docket No. 2-6462; *Seabor Produce Distributors, Inc v City Wide Distributors, Inc.*, PACA Docket No. 6471; *Gold Coast Packing, Inc. v City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc v. City Wide Distributors, Inc*, PACA Docket No. 6479; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc*, PACA Docket No. 6513, *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-f and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket 2-6600.

contends that dealing through Corry Brokerage it sold to respondent in seven transactions transpiring between April 13, 1983 and June 1, 1983 potatoes which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$11,874.75. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering the other issues in this case. Based on all the evidence available in this proceeding we find that during the period April through June 1983 respondent was subject the license under the Act. Pursuant to 7 U.S.C. 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling 1 ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of potatoes involved in the transaction which occurred on April 11, 1983, i.e. 100 100 pound sacks of U.S. No. 2 Baker Russet Potatoes, and 50 cartons of 60 count russet potatoes, in and of itself equals more than one ton, thereby meeting the requirement of the regulations. In addition, the quantity of goods purchased in the eighteen proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that for the period February through June 1983 respondent "purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities requiring a license under the Act during February, March, April, May and June 1983." That investigative report further showed that "respondent discontinued all activity in fresh fruits and vegetables during August 1983." Obviously, based

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. 499a(b) that it purchase at least \$230,000 worth of produce have been met.

upon the findings of the investigation by the Department, respondent was involved in two different types of business activity involving fruits and vegetables during the period February through June of 1983, and thereafter. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or a wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the potatoes. It is uncontroverted that on March 22, 1983, respondent was involved in a transaction, with Corry Brokerage acting as the broker, in which complainant sold potatoes either to it or to a business known as City Wide of Arkansas. There can be no question in this regard because on April 15, 1983, respondent issued its check in the amount of \$1,317.50 to complainant with respect to this earlier related transaction. In a letter to the Department of Agriculture with respect to this and other related proceedings Corry Brokerage stated that while it "received the order from Ralph Laite, Jr. in their Lowell Arkansas branch", such action was "done on the express authority of Ken Barnes in Tulsa who said that he himself knew nothing of fresh produce so is partner in Lowell would handle all of the ordering while Mr. Barnes would handle the financial end and direct sales from the Tulsa location." Although in its answer respondent denied that it had any involvement with respect to the transactions in issue in this proceeding, in its Answering Statement respondent acknowledged that at least for a short period of time it had agreed to pay invoices on behalf of City Wide Distributors of Arkansas. It stated that apparently complainant was one of the suppliers of commodities that received such a payment. The above facts do not prove that respondent actually purchased and received the potatoes involved in this proceeding. However, they do show that there was a course of conduct on the part of respondent on which both the broker and complainant relied in which respondent undertook to make payment on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. Respondent never denied that it did this. Neither did respondent show that it ever repudiated this alleged agreement, and conveyed such repudiation to Corry Brokerage. Furthermore, as an ostensible neutral third party in this proceeding, the word of the broker is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. (1984); *Kern Ridge Growers v. T.J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing broker's memoranda which

showed respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. We, find nothing in this record which might give credibility to respondent's claim that Corry Brokerage and Mr. Laite were in collusion with each other to mislead sellers of produce. Therefore, we have no alternative other than to find that respondent assumed liability for payment with respect to the seven transactions involved in this proceeding, and that both Corry Brokerage and complainant had a right to rely on those representations.

Having found that respondent made representations on which both Corry Brokerage and the complainant were entitled to rely as regards payment for the produce that was shipped, we must determine whether respondent is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transactions herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least, never repudiated that relationship. Furthermore, respondent held itself out as the buyer to complainant, and never repudiated that understanding. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its actions, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Parkhill Produce Company and for Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.* 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.* 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that none of the produce was ever delivered to it, we find based upon a preponderance of the evidence that complainant sold the goods to respondent, and that respondent either actually received the goods or received constructive livery of the goods. We are particularly impressed by the fact all the pertinent documents in this proceeding, i.e. complainant's invoices, Corry Brokerage's memoranda of sale, and the two bills of

lading issued by complainant, reflect that delivery was to be to respondent in Tulsa, Oklahoma.³ Presumably respondent received copies of both the invoices and the broker's memoranda of sale. At least it never denied that it did. If respondent truly were not involved in these transactions, having previously induced Corry Brokerage and complainant to believe that it was the receiver of goods in a related transaction, and having paid for those goods, respondent necessarily had to notify both those parties immediately upon receipt of the document that it did not receive or accept the produce. Otherwise, its action was misleading to both. Rather than do this, respondent did not take any action to deny the existence of these contracts until the Department of Agriculture undertook an investigation with respect to these matters. On July 20, 1983, Mr. Leslie S. Hauger, Jr., the attorney for respondent wrote Mr. Joseph E. Ward, the Director of the Southwestern Region of the Regulatory Branch of the Fruit and Vegetable Division, United States Department of Agriculture in Fort Worth, Texas, and told him that respondent had not purchased or received the goods. This was three months after the first transaction occurred, and almost two months after the last transaction occurred. This is simply too late for respondent to deny its involvement with respect to the seven transactions. Immediate action would have permitted complainant and Corry Brokerage to avoid further sales, and secondly to try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent has not paid complainant \$11,874.75 which complainant claims is due as a result of the seven transactions discussed above. Based upon our discussion, above, we find that responder owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this Order respondent shall pay to complainant, as reparation, \$11,874.75, with interest thereon at the rate of 13 percent per annum from July 1, 1983, until paid.

³ We note that one of the broker's memoranda of sale said that the delivery was to be made to City Wide in Mississippi. We believe this is probably an error on the part of the broker, and that it really meant to say that they were to be delivered to Tulsa, Oklahoma. This is particularly so since no party controverted that particular document.

Copies of this order shall be served upon the parties.

YAKIMA FRUIT & STORAGE CO. v. CITY WIDE DISTRIBUTORS, INC.
PACA Docket No. 2-6412. Decided January 31, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.

Dennis Becker, Presiding Officer

Complainant, *pro se*.

Lester S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$1,150.00 in connection with the sale of a truckload of apples in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000.00, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Respondent filed an answering statement. In addition respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Yakima Fruit & Cold Storage is a corporation with an address at P.O. Box 91, Yakima, Washington.
2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Boulevard, Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.
3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At some time prior to or during the time of the transaction involved in this pro-

ceeding, respondent admitted that "Upon receipt of invoices for produce allegedly purchased by the Arkansas corporation, the undersigned instructed the Respondent Corporation to pay such invoices, and to then invoice the Arkansas Corporation for the sums advanced, and for awhile this was done. When the Arkansas corporation failed to reimburse the Respondent Corporation, this practice was eliminated." However, respondent did not make any statement in the record as to when or how the practice of making such payments was terminated.

4. During the period in which the transaction involved in this proceeding occurred respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On May 9, 1983, complainant sold to respondent 100 size 100 tray cartons of fancy red delicious apples at \$7.50 per carton, and 50 cartons of size 100 tray cartons of golden delicious apples at \$8.00 per carton, for a total contract price of \$1,150.00, f.o.b. Corry Brokerage of Memphis, Tennessee, acted as the broker. It issued a broker's memorandum with respect to this transaction which showed that the respondent was the purchaser. Complainant issued an invoice on May 11, 1983, which showed that the goods were sold to respondent. Respondent did not complain until after the reparation complaint was filed that it was not the purchaser.

6. A formal complaint was filed in this proceeding on August 4, 1983, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant con-

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No 2-6386; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillie Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc v. City Wide Distributors, Inc.* PACA Docket No. 2-6440; *Bull & Price, Inc a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distribu-*
Continued

tends that dealing through Corry Brokerage it sold to respondent on May 9, 1983, apples which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$1,150.00. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction over this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as agent for respondent, and therefore could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering the other issues in this case. Based on all the evidence available in this proceeding we find that in May 1983, respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of apples involved in this transaction, in and of itself equals more than one ton, thereby meeting the requirements of the regulations. Indeed, there are in the record weight certificates which show that the two types of apples totalled 6,900 lbs. In addition, the quantities of goods purchased in the eighteen proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore the Department of Agriculture undertook an

tors, Inc. v. City Wide Distributors, Inc., PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. 499a(b) that it purchase at least \$230,000.00 worth of produce in any year have been met.

investigation to determine whether respondent was subject to the Act, and concluded based upon its inspection of respondent's records, that when this transaction occurred, respondent was involved in the purchase and sale of vegetables in interstate commerce. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or a wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless to who ultimately received the apples. It is uncontroverted that on May 9, 1983, respondent was involved in a transaction, with Corry Brokerage acting as the broker, in which complainant sold apples either to it or to a business known as City Wide of Arkansas. Although in its answer respondent denied that it had any involvement with respect to the transaction involved in this proceeding, in its Answering Statement respondent acknowledged that at least for some period of time it had agreed to pay invoices on behalf of City Wide Distributors of Arkansas. In addition, Corry Brokerage wrote a letter to the Department of Agriculture on August 2, 1983, which shows that the apples were delivered to respondent. It stated in that letter that "there was a minor decay problem reported on arrival, but long after 'a reasonable time' elapsed without settlement, the receiver was notified that full payment would be expected." In the context of this proceeding such statement by Corry Brokerage shows that the respondent was the receiver because Corry Brokerage knew the investigation was of respondent's activities. The above facts also show a course of conduct on the part of respondent on which the broker and the complainant relied, in which respondent undertook to make payment on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. Respondent never denied that it did this. Neither did respondent show that it ever repudiated this agreement, and conveyed such repudiation to Corry Brokerage. Furthermore, as an impartial third party in this proceeding the word of the broker is entitled to great weight. See *Homestead Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. (1984) *Kern Ridge Growers v. T. J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing a broker's memorandum which showed respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. There is no evidence in the record which might give credibility to respondent's claim that Corry Brokerage and Mr. Laite were in collusion with each other to mislead sellers of produce. Therefore, we

have no alternative other than to find at the very least that respondent assumed liability for payment with respect to the transaction involved in this proceeding, and that both Corry Brokerage and complainant had a right to rely on those representations.

Having found that respondent made representations on which both Corry Brokerage and the complainant were entitled to rely as regards payment for the produce that was shipped, we must determine whether respondent is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transactions herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least did not timely repudiate that relationship. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its actions created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Parkhill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928, (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Co. v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that the produce was not delivered to it, we find based upon a preponderance of the evidence that complainant sold the goods to respondent, and that respondent either actually received the goods or received constructive delivery of them. We are particularly impressed by the fact that all the pertinent documents in this proceeding, i.e., complainant's invoice and Corry Brokerage's memorandum of sale, reflect that the delivery was to be to respondent in Tulsa, Oklahoma. Presumably respondent received copies of both the invoice and the broker's memorandum of sale. At least it never denied that it did. If respondent truly were not involved in this transaction, having previously induced Corry Brokerage to believe that it was the receiver of goods in related transactions, and having promised to pay, and apparently

having paid for those goods, respondent necessarily had to notify both parties immediately upon receiving the document that it did not receive or accept the produce. Otherwise its action was misleading to both. Rather than do this respondent did not take any action to deny the existence of this contract until the Department of Agriculture undertook an investigation with respect to these matters. It was not until September 8, 1983, that respondent denied in its answer that it was involved in the transaction. This was four months after the transaction occurred. This is simply too late for respondent to deny its involvement with respect to the transaction. Immediate action would have permitted complainant and Corry Brokerage to try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent has not paid complainant \$1,150.00 which complainant claims is due as a result of the transaction discussed above. Based upon our discussion above we find that respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded complainant with interest.

ORDER

Within 30 days from the date of this Order respondent shall pay to complainant as reparation \$1,150.00, with interest thereon at the rate of 13 percent per annum from June 1, 1983, until paid.

DONALD F. NICOLAUS d/b/a D-N PRODUCE v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6421. Decided January 31, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.

Dennis Becker, Presiding Officer.

Complainant, *pro se*

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award in the amount of \$1,675 in connection with the sale of two partial truckloads of lettuce in interstate commerce.

A copy of the Report of Investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000 the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Respondent filed an answering statement. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Donald F. Nicolaus, is an individual doing business as D-N Produce, with an address at 229 West Winged Food Road, Phoenix, Arizona.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Boulevard, Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. During the time of the transactions involved in this proceeding respondent was involved in an agreement between itself and City Wide Distributors of Arkansas in which respondent assumed financial responsibility for any produce shipments involving the Arkansas corporation. Respondent also dealt with City Wide Distributors of Arkansas. Shipments were made between the two companies from time to time.

4. With respect to each of the transactions involved in this proceeding Corry Brokerage of Memphis, Tennessee, acted as the broker.

5. During the time of the transactions involved in this proceeding respondent purchased and sold fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

6. On April 18, 1983, complainant sold to respondent in interstate commerce 150 cartons of 24 size lettuce at \$7.00 a carton plus \$105.00 for cooling and \$30.00 for brokerage, for a total contract price of \$1,185, f.o.b. The lettuce was shipped on April 20, 1983. Complainant issued an invoice which showed that the goods were sold to respondent. Corry Brokerage issued a broker's memorandum with respect to this transaction which showed that the re-

spondent was the purchaser. Complainant issued a bill of lading signed by the trucker which showed that respondent was the receiver of the goods. Respondent did not complain until July 20, 1983, that it was not the purchaser.

7. On April 25, 1983, complainant sold to respondent in interstate commerce 100 cartons of size 24 lettuce at \$4.00 a carton plus \$70.00 for cooling and \$20.00 for brokerage, for a total price of \$490, f.o.b. Complainant issued an invoice which showed that the goods were sold to respondent. Corry Brokerage issued a broker's memorandum which showed that the respondent was the purchaser. Complainant issued a bill of lading which was signed by the trucker which showed that the goods were to be delivered to respondent. Respondent did not complain until July 20, 1983, that it was not the purchaser.

8. A formal complaint was filed in this proceeding on August 8, 1983, which was within nine months of the time of the cause of action herein accrued.

DISCUSSION

This is one of eighteen similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillie Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

contends that dealing through Corry Brokerage it sold to respondent in two transactions transpiring on April 18, 1983 and April 25, 1983, partial truckloads of lettuce which were received and accepted by respondent, and for which respondent has failed to make payment in the total amount of \$1,675. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering the other issues in this case. Based on all the evidence available in this proceeding we find that during April 1983 respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate for foreign commerce" Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of lettuce involved in the transaction which occurred on April 18, 1983, *i.e.* 150 24 size cartons, in and of itself equals more than one ton, thereby meeting the requirement of the regulations. In addition, the quantity of goods purchased in the eighteen proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased more than \$230,000 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether the respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that for the period in which the transactions herein occurred respondent was "conducting a business requiring a license under the Perishable Agricultural Commodities Act." It based its conclusion on respondent's files which showed that there were many out of state seller's invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based upon the findings of the investigation by the Department, respondent was involved in the purchase and sale of

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000 worth of produce a year have been met

fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the lettuce. In a letter to the Department of Agriculture contained in the report of investigation Mr. Arthur M. Zurhorst of Corry Brokerage stated with respect to the transactions involved in this proceeding that:

I received the order from Ralph Laite, Jr. in their Lowell, Arkansas branch. This was done on the express authority of Ken Barnes in Tulsa who said that he himself knew nothing about fresh produce so his partner in Lowell would handle all of the ordering while Mr. Barnes would handle the financial end and direct sales from the Tulsa location.

Although in its answer respondent denied that it had any involvement with respect to the transactions in this proceeding, the statement of Corry Brokerage, above, shows that respondent engaged in a course of conduct on which both the broker and complainant relied, in which respondent at least undertook to make payments on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. Indeed, in its brief, respondent admitted that some of the billings for produce it claims were sent to City Wide Distributors of Arkansas were paid by respondent. Respondent did not show that it ever repudiated such an arrangement, or conveyed such repudiation to Corry Brokerage. Furthermore, as an ostensibly neutral third party in this proceeding the word of the broker is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T. J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing broker's memoranda which show respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. There is no evidence in the record which might lend credibility to respondent's claim that Corry Brokerage and Mr. Laite were in collusion with each other to mislead sellers of produce. Therefore, based on the facts discussed above, we have no alternative other than to find that respondent at least assumed liability for payment with respect to the two transactions involved in this

proceeding, and that both Corry Brokerage and complainant had a right to rely on those representations.

Having found that respondent made representations on which Corry Brokerage and the complainant were entitled to rely as regards payment for the produce that was shipped we must determine whether respondent is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transaction herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least did not timely repudiate that relationship. Furthermore, respondent effectively held itself out as the buyer to complainant, and never repudiated that understanding. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its actions, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, the complainant was entitled to look to it for reimbursement. *The G. Fava Company v. Park Hill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent. Complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that none of the produce was ever delivered to it, we find based upon a preponderance of the evidence that complainant sold the goods to respondent, and that respondent either actually received the goods or received constructive delivery of them. We are particularly impressed by the fact that all of the pertinent documents in this proceeding, i.e. complainant's invoices and Corry Brokerage's memoranda of sale, as well as complainant's bills of lading which were signed by the truckers, reflect that the delivery was to be to respondent in Tulsa, Oklahoma. Presumably respondent received copies of both the invoices and the broker's memoranda of sale. At least it never denied in a sworn statement that it did. If respondent truly were not involved in these transactions, having previously induced Corry Brokerage and the complainant to believe that it was the receiver of goods in re-

lated transactions, and having paid for those goods, respondent necessarily had to notify both parties immediately upon receipt of the documents that it did not receive or accept the produce. Otherwise its action was misleading to both. Rather than do this respondent did not take any action to deny the existence of these contracts until the Department of Agriculture undertook an investigation with respect to these matters. On July 20, 1983, Mr. Leslie S. Hauger, Jr., the attorney for respondent, wrote Mr. Joseph E. Ward, the Director of the Southwestern Region of the Regulatory Branch of the Fruit and Vegetable Division, United States Department of Agriculture, in Fort Worth, Texas, and told him that respondent did not purchase or receive the goods. This was almost three months after the transactions involved herein occurred. Furthermore, it was not until August 8, 1983, that respondent denied in its answer that it was involved in the transactions. This is simply too late for respondent to deny its involvement with respect to the transactions. Immediate action would have permitted complainant and Corry Brokerage to try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows very clearly that respondent did purchase and receive the goods.

Respondent has not paid complainant \$1,675 which complainant claims is due as a result of the two transactions discussed above. Based upon our discussion above, we find respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this Order respondent shall pay to complainant as reparation, \$1,675 with interest thereon at the rate of 13% per annum from June 1, 1983, until paid.

CAROLINA PACKERS v. EMERSON H. ELLIOTT d/b/a EMERSON ELLIOTT
PRODUCE. PACA Docket No. 2-6700. Decided January 23, 1985.

Admission of indebtedness—Reparation awarded.

Andrew Y Stanton, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$7,798.50 in connection with a shipment of tomatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to Section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Carolina Packers, is a partnership whose address is P.O. Box 35, Johns Island, South Carolina 29455. Respondent, Emerson H. Elliott d/b/a Emerson Elliott Produce, is a individual whose address is P.O. Box 745, Casselberry, Florida 32707. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this Order. On the basis of these facts, we conclude that the actions of respondent are in violation of Section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$7,798.50. Accordingly, within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$7,798.50, with interest thereon at the rate of 13 percent per annum from July 1, 1984, until paid.

DENNIS PRODUCE SALES, INC. v. CITY WIDE DISTRIBUTORS, INC.
PACA Docket No. 2-6422. Decided January 31, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Lester S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$335.25 in connection with two transactions in interstate commerce involving shipments of carrots and onions.

A copy of the report of investigation prepared by the Department was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying liability to complainant. Since the amount claimed as damages does not exceed \$15,000 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence in the form of verified statements. Respondent filed an answering statement to which complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Dennis Produce Sales, Inc., is a corporation with an address at P.O. Box 687, Lamont, California.
2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Boulevard, Tulsa, Oklahoma. During the time in which the transactions in this proceeding occurred respondent was subject to license under the Act.
3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr. is also a shareholder in that corporation. During the period when the transactions involved in this proceeding occurred respondent was involved in an agreement between itself and City

Wide Distributors of Arkansas under which respondent assumed financial responsibility for any produce shipments made to Lowell, Arkansas. With respect to some transactions the produce was shipped first to Tulsa, Oklahoma. With respect to other transactions the produce was shipped to Lowell, Arkansas. Shipments were also made between the two companies from time to time.

4. With respect to the two transactions involved in this proceeding Corry Brokerage of Memphis, Tennessee, was the broker.

5. During the months of April and May 1983 respondent purchased and sold fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

6. On April 19, 1983, complainant sold to respondent in interstate commerce 50 poly bags of 25 pound jumbo carrots at \$2.50 per bag, plus 35 cents per bag for cooling and 20 cents per bag for brokerage, and \$6.00 for ice, for a total price of \$158.50, f.o.b. Complainant issued an invoice which showed that the goods were sold to respondent. Complainant also issued a bill of lading signed by the truck driver which showed that the goods were destined for respondent in Tulsa, Oklahoma. Corry Brokerage issued a broker's memorandum with respect to this transaction which showed that the respondent was the purchaser. Respondent did not complain until July 20, 1983 that it was not the purchaser.

7. On May 16, 1983, complainant sold to respondent in interstate commerce 50 poly bags of 25 pound jumbo carrots at \$2.50 per bag, plus 35 cents per bag for cooling and 20 cents per bag for brokerage, for a total price of \$152.50; and also sold 5 boxes of onions at \$4.00 per box, plus 65 cents for cooling and 20 cents for brokerage, for a total price of \$24.25, and a total contract price of \$176.50, f.o.b. Complainant issued an invoice which showed that the goods were sold to respondent. Complainant also issued a bill of lading signed by the truck driver which showed that the goods were destined for respondent in Tulsa, Oklahoma. Corry Brokerage issued a broker's memorandum which showed that the respondent was the purchaser. Respondent did not complain until July 20, 1983, that it was not the purchaser.

8. A formal complaint was filed in this proceeding on August 5, 1983, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

This is one of eighteen similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant contends that dealing through Corry Brokerage it sold to respondent in two transactions transpiring on April 19, 1983, and May 16, 1983, partial truckloads of carrots and a few cartons of onions, which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$335.25. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as agent for respondent, and therefore, could not bind it. Third, respondent says that there was no contract received between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding. Fifth, respondent contends that the complainant's claims are barred by the statute of frauds.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period April and May 1983

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other seventeen cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-63886; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillee Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." Although the quantity of produce involved in the two transactions in this proceeding is not so substantial as to warrant the conclusion that 2,000 pounds were shipped in any day, the quantity of goods purchased in *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485, was so substantial as to warrant the conclusion that more than one ton was purchased during this period of time. Judicial notice is taken of the decision which was recently issued in that proceeding. In addition, the quantity of goods purchased in the eighteen proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased more than \$230,000 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records that for the period April through June 1983, respondent was "conducting a business requiring a license under the Perishable Agricultural Commodities Act." It based its conclusion on records in respondent's files which showed that there were many out of state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based upon the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the carrots and onions. In a letter to the Department of Agriculture which was undated, but received by the Department on August 17, 1983, Arthur M. Zurhorst of Corry Brokerage stated

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce a year have been met.

with respect to the transactions involved in this proceeding as follows:

In every case, I received the order from Ralph Laite, Jr. in their Lowell, Arkansas branch. This was done on the express authority of Ken Barnes in Tulsa who said that he himself knew nothing about fresh produce so his partner in Lowell would handle all of the ordering while Mr. Barnes would handle the financial end and direct sales from the Tulsa location.

Although in its answering statement respondent denied that it had any involvement with respect to the transactions involved herein it acknowledged in its brief that Mr. Barnes agreed to advance funds to the Arkansas corporation for the purchase of produce. It further acknowledged that "Mr. Barnes, as President of the Respondent corporation, arranged to have the Respondent pay some of the invoices, and to bill the Arkansas corporation." While that fact, and the statement of Corry Brokerage, do not prove that respondent actually purchased and received the produce involved in this proceeding, they do show that there was a course of conduct on the part of respondent on which both the broker and complainant relied, in which respondent at least undertook to make payments on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. Respondent never denied that it did this. Neither did respondent show that it ever repudiated this alleged agreement, and conveyed such repudiation to Corry Brokerage. Furthermore, as an ostensibly neutral third party in this proceeding the word of the broker is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T. J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing broker's memoranda which show respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. We find nothing in this record to support respondent's contention that City Wide Distributors of Arkansas and Corry Brokerage were in collusion to show that respondent was the purchaser. Therefore, based on the facts discussed above, we have no alternative other than to find that respondent at least assumed liability for payment with respect to the two transactions involved in this proceeding, and that both Corry Brokerage and complainant had a right to rely on those representations.

Having found that respondent made representations on which both Corry Brokerage and the complainant were entitled to rely as regards payment for the produce that was shipped we must deter-

mine whether respondent is liable. When a party subject to license under the Act, or alternately which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokergage was not its agent when the transaction herein accrued must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least never repudiated that relationship. Furthermore, respondent indirectly held itself out as the buyer to complainant, and never repudiated that understanding. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its action, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Park Hill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that none of the produce was ever delivered to it, we find based upon a preponderance of the evidence that complainant sold the goods to respondent, and that respondent either actually received the goods or received constructive delivery of them. We are particularly impressed by the fact that all the pertinent documents in this proceeding, *i.e.* complainant's invoices and Corry Brokerage's memoranda of sale, as well as the bills of lading signed by the truckers which were issued by complainant, reflect that delivery was to be to respondent in Tulsa, Oklahoma. Presumably respondent received copies of the invoices and the broker's memoranda of sale. At least it never denied in a sworn statement that it did. If respondent truly were not involved in these transactions, having previously induced Corry Brokerage and the complainant to believe that it was the purchaser of the goods, respondent necessarily had to notify both those parties immediately upon receipt of the documents involved that it did not receive or accept the produce. Otherwise its action was misleading to both. Rather than do this respondent did not take any action to deny the existence of these contracts until the Department of Agri-

culture undertook an investigation with respect to these matters. On July 20, 1983, Mr. Leslie S. Hauger, Jr., the attorney for respondent, wrote Mr. Joseph E. Ward, the Director of the Southwestern Region of the Regulatory Branch of the Fruit and Vegetable Division, United States Department of Agriculture, in Fort Worth, Texas, and told him that respondent did not purchase or receive the goods. This was three months after the first transaction involved herein accrued, and two months after the second transaction accrued. Indeed, there is no indication that complainant or Corry Brokerage learned of complainant's claim until the answer was filed on August 5, 1983. This is simply too late for respondent to deny its involvement with respect to the several transactions. Immediate action would have permitted complainant and Corry Brokerage to avoid the second sale, and secondly, to try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent also claims that because at most respondent guaranteed payment to complainant on behalf of City Wide Distributors of Arkansas, such guarantee is unenforceable because it is not in writing as required by the Oklahoma statute of frauds. Since we have found that respondent was the actual purchaser of the goods, the statute of frauds does not apply.³

Respondent has not paid complainant \$335.25 which complainant claims is due as a result of the two transactions discussed above. Based upon our discussion, above, we find respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$158.50, with interest thereon at the rate of 13 percent per annum from May 1, 1983 until paid. Furthermore, within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$176.75 with interest

³ Respondent argued that a letter from Mr. Zurhorst of Corry Brokerage which was in the Departmental investigation report could not be considered because it was inadmissible. In reparation proceedings all materials attached to investigation reports are considered as part of the evidence in the case. See 7 CFR 47.7.

thereon at the rate of 13 percent per annum from June 1, 1983, until paid.

APPLE SALES, INC. v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6423. Decided January 31, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—Reparation awarded.

Dennis Becker, Presiding Officer.

Complainant, *pro se*

Valikanje, Moore & Shore, Yakima, Washington, for complainant.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award in the amount of \$4,600.00 in connection with four transactions in interstate commerce involving shipments of partial truckloads of apples.

A copy of the report of investigation prepared by the Department was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. Since the amount claimed as damages does not exceed \$15,000 the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence in the form of verified statements. Complainant filed an opening statement. Respondent filed an answering statement. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Apple Sales, Inc., is a corporation with an address at P.O. Box 2446, Yakima, Washington.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Boulevard, Tulsa, Oklahoma. During the time in which the transactions in this proceeding occurred respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. During the time of the transactions involved in this proceeding respondent was involved in an agreement between itself and City Wide Distributors of Arkansas in which respondent assumed financial responsibility for any produce shipments shipped to Lowell, Arkansas. With respect to some transactions the produce was shipped first to Tulsa, Oklahoma. With respect to other transactions the produce was shipped to Lowell, Arkansas. Shipments were also made between the two companies from time to time.

4. With respect to the four transactions involved in this proceeding Corry Brokerage of Memphis, Tennessee, acted as the broker.

5. During the months of April and May 1983 respondent purchased and sold fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

6. On April 11, 1983, complainant sold to three purchasers in interstate commerce located in Arkansas various quantities of apples at various prices. On that same date it sold 100 cartons of U.S. fancy red apples at \$7.00 per carton, f.o.b., which apples were placed on the same truck. The apples showed a destination of Tulsa, Oklahoma. Subsequently, complainant issued an invoice on April 12, 1983, which showed that the apples were sold to respondent. Corry Brokerage of Memphis, Tennessee, was the broker with respect to the sale to the four buyers. It issued a broker's memorandum of sale with respect to the 100 cartons that complainant claims to have sold to respondent which showed that the apples were sold to respondent. Respondent received this broker's memorandum of sale. There was also issued a warehouse distribution ticket signed by the driver which showed that the destination of the apples was Tulsa, Oklahoma. Respondent did not complain until July 20, 1983, after the Department of Agriculture initiated an investigation, that it was not the purchaser.

7. On April 18, 1983, complainant sold to respondent in interstate commerce 300 cartons of various types of apples at various prices for a total contract price of \$2,775.00, f.o.b. On April 20, 1983 it issued an invoice which showed that the apples were sold to respondent. Corry Brokerage was the broker for this transaction, and issued a memorandum of sale which showed that respondent was the purchaser. A bill of lading was also issued with respect to this transaction which showed that respondent was to receive delivery. Respondent did not complain until July 20, 1983, after the Depart

ment of Agriculture initiated an investigation, that it was not the purchaser.

8. On May 3, 1983, complainant sold to respondent in interstate commerce 100 cartons of U.S. fancy red apples at \$7.50 per carton for a total contract price of \$750.00, f.o.b. There was also sold to an individual located in Memphis, Tennessee 50 cartons as a result of an order placed with complainant at the same time by Corry Brokerage. On May 4, 1983, complainant issued an invoice which showed that respondent was the purchaser. Complainant also issued a bill of lading signed by the truck driver which showed that the apples were to be delivered to Tulsa, Oklahoma. Corry Brokerage issued a broker's memorandum of sale which showed that respondent was the purchaser. Respondent did not complain until July 20, 1983, after the Department of Agriculture initiated an investigation, that it was not the purchaser.

9. On May 19, 1983, complainant sold various quantities of apples at various prices to two purchasers located in Arkansas and one purchaser located in Memphis, Tennessee. In the same transaction it sold 50 cartons of U.S. fancy red apples in interstate commerce which its confirmation of sale reflected were sold to respondent. On May 25, 1983, complainant issued an invoice which showed that the 50 cartons of apples were sold to respondent. Corry Brokerage was the broker with respect to the transaction involving the four purchasers. With respect to that portion of the transaction involving alleged sales to respondent Corry Brokerage issued a confirmation of sale which showed that respondent was the purchaser. Complainant also issued a bill of lading which showed that the apples were to be shipped to respondent. Respondent did not complain until July 20, 1983, after the Department of Agriculture initiated an investigation, that it was not the purchaser.

10. A formal complaint was filed on July 26, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

This is one of eighteen similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386;
Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc., PACA Docket

Continued

contends that dealing through Corry Brokerage it sold to respondent in four transactions transpiring between April 11, 1983, and May 24, 1983, partial truckloads of apples which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$4,600.00 Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as agent for respondent, and therefore, could not bind it. Third, respondent says that it never received the invoices issued by complainant. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period April and May 1983 respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of apples involved in the transaction which occurred on April 18, 1983, i.e. 350 cartons of apples, in and of itself equals more than one ton, thereby meeting the requirements of the regulations. In addition, the quantity of goods purchased in the eight-

No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Jack T. Baillee Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.* PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

een proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased more than \$230,000 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that for the period April and May 1983, respondent was "conducting a business requiring a license under the Perishable Agricultural Commodities Act." It based its conclusion on records in respondent's files which showed that there were many out of state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based upon the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the apples. Although in its answer respondent denied that it had any involvement with respect the four transactions in issue in this proceeding, respondent admitted in its answering statement that it had undertaken to pay invoices which it received for produce purchased through Corry Brokerage. It claimed that it had made such payments on behalf of City Wide Distributors of Arkansas, Inc. Thus, even if it did not purchase and receive the goods itself, it was involved in a number of transactions in which fruit and produce was shipped in interstate commerce. We conclude based upon this that respondent had entered agreement, at least, under which it would pay for goods shipped to City Wide Distributors of Arkansas. Its conduct shows that there was a course of conduct on the part of respondent on which both the broker and complainant relied, in which respondent undertook to make payments on behalf of City Wide Distributors of Arkansas. Respondent never denied that it did this. Neither did respondent show that it ever repudiated such an agreement, or convey such repudiation to Corry Brokerage. Furthermore, as an ostensibly neutral third party in this proceeding the word of the broker is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce a year have been met.

(1984); *Kern Ridge Growers v. T. J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing broker's memoranda which show respondent as the purchaser, clearly manifested its understanding that respondent was either the purchaser and receiver of the produce or has assumed liability for payment. Therefore, based on the facts discussed above, we have no alternative other than to find that respondent at least assumed liability for payment with respect to the four transactions involved in this proceeding, and that both Corry Brokerage and complainant had a right to rely on those representations.³

Having found that respondent made representations on which both Corry Brokerage and the complainant were entitled to rely as regards payment for the produce that was shipped, we must determine whether respondent is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transactions herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least never repudiated that relationship. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its actions, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Parkhill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National*

³ We note that with respect to the four transactions that there is a distinction between those which occurred on April 11, 1983, and May 19, 1983, as opposed to those which occurred on April 18, 1983, and May 3, 1983. For the first two mentioned transactions most of the apples aboard the truck are shown to have gone to Arkansas. It is likely that respondent's claim that these apples were destined for it is accurate, and that they were received by City Wide Distributors of Arkansas. However, because they are inextricably interwoven with the other two transactions insofar as complainant and Corry Brokerage are concerned, we have no alternative other than to find that respondent assumed liability for payment for them.

Growers Corp., 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that none of the produce was ever delivered to it, we find based upon a preponderance of the evidence that with respect to the transactions which occurred on April 18, 1983, and May 2, 1983, respondent either actually received the goods or received constructive delivery of them. We are particularly impressed by the fact that all pertinent documents in this proceeding, i.e. complainant's invoices and Corry Brokerage's memoranda of sale, as well as the bills of lading reflect that the delivery was to be to respondent in Tulsa, Oklahoma. Presumably, respondent received copies of the invoices and the broker's memoranda of sale. At least it never denied in a sworn statement that it did. If respondent truly were not involved in these transactions, having previously induced Corry Brokerage and the complainant to believe that it was the purchaser by its course of conduct, respondent necessarily had to notify both those parties immediately upon receipt of the document that it did not receive or accept the produce. Otherwise its action was misleading to both. Rather than do this respondent did not take any action to deny the existence of these contracts until the Department of Agriculture undertook an investigation with respect to these matters. On July 20, 1983, Mr. Leslie S. Hauger, Jr., the attorney for respondent, wrote Mr. Joseph E. Ward, the Director of the Southwestern Region of the Regulatory Branch of the Fruit and Vegetable Division, United States Department of Agriculture, in Fort Worth, Texas, and told him that respondent did not purchase or receive the goods. This was three months after the first transaction involved herein occurred, and two months after the last transaction occurred. This is simply too late for respondent to deny its involvement with respect to the two transactions mentioned above. Immediate action would have permitted complainant and Corry Brokerage to avoid further sales, and secondly, to try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

With respect to the transactions which occurred on April 18, 1983, and May 24, 1983, we conclude based upon our review of the confirmations of sale provided by complainant that the apples claimed to have been purchased by respondent more likely were purchased City Wide Distributors of Arkansas based on the fact that other produce on the truck which took those apples was delivered to Arkansas. However, it makes no difference because by its actions, as discussed above, respondent led complainant and Corry Brokerage to the belief that it was responsible for payment for

those goods. We find nothing in this record to indicate that Corry Brokerage and City Wide Distributors of Arkansas were in collusion to make it appear that respondent was the purchaser and receiver of the goods. Indeed, respondent had it in its power at all times to take necessary action to avoid any such appearance had it desired to do so.

Respondent has not paid complainant \$4,600.00 which complainant claims is due as a result of the four transactions discussed above. Based on our discussion, above, we find respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$3,475.00, with interest thereon at the rate of 13 percent per annum from June 1, 1983, until paid. Furthermore, within thirty days from the date of this Order respondent shall pay to complainant, as reparation \$1,125.00, with interest thereon at the rate of 13 percent per annum from July 1, 1983, until paid.

GOLD COAST PACKING INC. v. CITY WIDE DISTRIBUTING, INC. PACA
Docket No. 2-6474. Decided February 19, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$178.50 in connection with the sale of a partial truckload of brocolli in interstate commerce.

A copy of the report of investigation, and a supplemental report of investigation, prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement. Respondent filed an answering statement. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Gold Coast Packing, Inc., is a corporation with an address at P.O. Box 1023, Santa Monica, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Blvd., Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At one point Mr. Barnes agreed with Mr. Laite that respondent would advance money to City Wide Distributors of Arkansas for the purchase of produce since the latter corporation lacked operating capital. Respondent admitted that immediately prior to the time of the transaction involved herein, and possibly when it occurred, that "upon receipt of produce allegedly purchased by the Arkansas Corporation, the undersigned requested the Respondent Corporation to pay such invoices, and to then invoice the Arkansas Corporation for the sums advanced. When the Arkansas Corporation failed to reimburse the Respondent Corporation, this practice was terminated." However, respondent did not make any statement in the record as to when or how the practice of making such payments was terminated.

4. During the time of the transaction involved in this proceeding respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On April 1, 1983 complainant sold to respondent in interstate commerce 15 cartons of brocolli at \$15.00 per carton, plus \$.50 per carton for cooling, \$.20 a carton for palletization and \$.20 a carton for brokerage, for a total contract price of \$178.50. Corry Brokerage of Memphis, Tennessee was the broker. It issued a broker's memorandum which showed that the respondent was the purchaser.

Complainant issued an invoice which showed that the goods were sold to respondent. A bill of lading was also issued by complainant which showed that the goods were destined for delivery to respondent in Tulsa, Oklahoma. Respondent did not complain that it was not the purchaser until it filed its answer in this proceeding on January 31, 1984.

6. A formal complaint was filed in this proceeding on December 1, 1983, which was within nine months of the time of the cause of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant contends that dealing through Corry Brokerage it sold to respondent 15 cartons of broccoli which was received and accepted by respondent.

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillie Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.* PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600. *utors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

ent, but for which respondent has failed to make payment in the total amount of \$178.50. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period of the transactions respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of goods purchased in the 18 proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased produce totaling at least 2,000 pounds during the period April through June, 1983. In addition, the quantity of goods purchased in those 18 proceedings is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that respondent was, during the time of this transaction, conducting a business requiring a license under the Perishable Agricultural Commodities Act. It based its conclusion on records in respondent's files which showed that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce in a year have been met.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the brocolli. Respondent has suggested that the produce was bought by City Wide Distributors of Arkansas. However, it acknowledged in its brief that at least for a short period of time it had agreed to pay invoices on behalf of the Arkansas Corporation. This acknowledgement in its brief is inconsistent with respondent's claim in paragraph 8 of its Answering Statement that "At no time did I, personally or as an officer of the Respondent Corporation, guarantee the payment of invoices for produce ordered by the Arkansas Corporation." Corry Brokerage, of course, issued a broker's memorandum which showed that respondent was the purchaser. The above facts do not prove that respondent actually purchased and received the produce involved in this proceeding. However, they do show that there was a course of conduct on the part of respondent on which both the broker and complainant relied, under which respondent undertook to make payment on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. As an ostensibly neutral third party in this proceeding, the word of the broker, as manifested by its memorandum, is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T.J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing a broker's memorandum which shows respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. We find nothing in this record which might give credibility to respondent's claim that Corry Brokerage and Mr. Laite were in collusion with each other to mislead sellers of produce. Therefore, based on the facts discussed above, we have no alternative other than to find the respondent was involved with respect to the transaction involved in this proceeding.

Having found that respondent was involved in the transaction we must determine whether it is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transaction herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least did not repudiate that relationship until almost two months after the transaction

occurred. Furthermore, respondent held itself out as the buyer to complainant, and did not repudiate that understanding until it filed its answer on January 31, 1984. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its action, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Park Hill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, Agric. Dec. 1140 (1955).

With respect to respondent's claim that the produce was never delivered to it, we find based upon a preponderance of the evidence that respondent either actually received the goods or received constructive delivery of them. Corry Brokerage issued a broker's memorandum of sale showing that respondent was the purchaser. Complainant also issued an invoice showing that respondent was the purchaser, and complainant provided a bill of lading which showed that respondent was the purchaser. It is our conclusion that the evidence is sufficient to show that respondent did purchase the goods.³

We are particularly impressed with the fact that the invoice and broker's memorandum were sent to respondent approximately at the time the transactions occurred. Presumably, respondent received copies of the invoices and the broker's memoranda of sale. At least it never denied it did. If respondent were truly not involved in these transactions, it should have notified both those parties immediately upon receipt of the documents that it did not receive or accept the produce. Otherwise, its failure to do so was misleading to both. Rather than do this respondent did not take any action to deny the existence of this contract until January 31, 1984. This was nine months after the transaction occurred. This is

³ Respondent attached a copy of the complaint in *Don Whitfield d/b/a Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513, in an effort to support its claim it did not purchase the goods. We are not impressed by its contents. Complainant can hardly be bound by a complaint in another case, particularly when that case has not been decided.

simply too late for respondent to deny its involvement with respect to the transaction. Immediate action would have permitted complainant and Corry Brokerage try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent has not paid complainant \$178.50 with respect to the transaction discussed above. Based upon our discussion, above, we find the respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$178.50 with interest thereon at the rate of 13% per annum from June 1, 1983, until paid.

TANITA FARMS, INC. v. CITY WIDE DISTRIBUTING, INC. PACA Docket
No. 2-6440. Decided February 19, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$91.25 in connection with the sale of a partial truckload of onions and turnips in interstate commerce.

A copy of the report of investigation, and a supplemental report of investigation, prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in tl

form of verified statements. Complainant filed an opening statement. Respondent filed an answering statement. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Tanita Farms, Inc., is a corporation with an address at P.O. Box 815, Glendale, Arizona.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Blvd., Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At one point Mr. Barnes agreed with Mr. Laite that respondent would advance money to City Wide Distributors of Arkansas for the purchase of produce since the latter corporation lacked operating capital. Respondent admitted that immediately prior to the time of the transaction involved herein, and possibly when it occurred, that "upon receipt of produce allegedly purchased by the Arkansas Corporation, the undersigned requested the Respondent Corporation to pay such invoices, and to then invoice the Arkansas Corporation for the sums advanced. When the Arkansas Corporation failed to reimburse the Respondent Corporation, this practice was terminated." However, respondent did not make any statement in the record as to when or how the practice of making such payments was terminated.

4. During the time of the transaction involved in this proceeding respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On April 2, 1983, complainant sold to respondent in interstate commerce 15 cartons of onions at \$4.20 per carton and five cartons of turnips at \$3.70 per carton, plus \$.65 per carton for cooling the onions, for a total contract price of \$91.25, f.o.b. Corry Brokerage of Memphis, Tennessee was the broker. It issued a broker's memorandum which showed that the respondent was the purchaser. Complainant issued an invoice which showed that the goods were sold to respondent. A bill of lading which was signed by the truck driver was issued by complainant which showed that the goods were destined for delivery to respondent in Tulsa, Oklahoma. Respondent did not complain that it was not the purchaser until it filed its answer in this proceeding on December 15, 1983.

6. A formal complaint was filed in this proceeding on August 24, 1983, which was within nine months of the time of the cause of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant contends that dealing through Corry Brokerage it sold to respondent onions and turnips which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$91.25. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillie Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6517; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 6600.

this proceeding we find that during the period of the transactions respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of goods purchased in the 18 proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased produce totaling at least 2,000 pounds during the period April through June, 1983. In addition, the quantity of goods purchased in those 18 proceedings is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that respondent was, during the time of this transaction, conducting a business requiring a license under the Perishable Agricultural Commodities Act. It based its conclusion on records in respondent's files which showed that there were out-of-state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the strawberries. Respondent has suggested that the produce was bought by City Wide Distributors of Arkansas. However, it acknowledged in its brief that at least for a short period of time it had agreed to pay invoices on behalf of the Arkansas Corporation. This acknowledgment in its brief is inconsistent with respondent's claim in paragraph 8 of its Answering Statement that "At no time did I, personally or as an officer of the Respondent Corporation, guarantee the payment of invoices for produce ordered by the Ar-

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce in a year have been met.

kansas Corporation." Corry Brokerage, of course, issued a broker's memorandum which showed that respondent was the purchaser. The above facts do not prove that respondent actually purchased and received the produce involved in this proceeding. However, they do show that there was a course of conduct on the part of respondent on which both the broker and complainant relied, under which respondent undertook to make payment on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. As an ostensibly neutral third party in this proceeding, the word of the broker, as manifested by its memorandum, is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T.J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing a broker's memorandum which shows respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. We find nothing in this record which might give credibility to respondent's claim that Corry Brokerage and Mr. Laite were in collusion with each other to mislead sellers of produce. Therefore, based on the facts discussed above, we have no alternative other than to find the respondent was involved with respect to the transaction involved in this proceeding.

Having found that respondent was involved in the transaction we must determine whether it is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transactions herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least did not repudiate that relationship until almost two months after the last transaction occurred. Furthermore, respondent held itself out as the buyer to complainant, and did not repudiate that understanding until it filed its answer on December 15, 1983. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its action, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Park Hill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is es-

topped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that the produce was never delivered to it, we find based upon a preponderance of the evidence that respondent either actually received the goods or received constructive delivery of them. Corry Brokerage issued a broker's memorandum of sale showing that respondent was the purchaser. Complainant also issued an invoice showing that respondent was the purchaser, and complainant provided a bill of lading signed by the truck driver which showed that respondent was the purchaser. It is our conclusion that the evidence is sufficient to show that respondent did purchase the goods.³

We are particularly impressed with the fact that the invoice and broker's memorandum was sent to respondent approximately at the time the transactions occurred. Presumably, respondent received copies of the invoices and the broker's memoranda of sale. Although it denies it did there is nothing in this record to show that the documents were not sent to the address contained on them. If respondent were truly not involved in these transactions, it should have notified both those parties immediately upon receipt of the documents that it did not receive or accept the produce. Otherwise, its failure to do so was misleading to both. Rather than do this respondent did not take any action to deny the existence of this contract until December 15, 1983. This was eight months after the transaction occurred. This is simply too late for respondent to deny its involvement with respect to the transaction. Immediate action would have permitted complainant and Corry Brokerage try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent has not paid complainant \$91.25 with respect to the transaction discussed above. Based upon our discussion, above, we find the respondent owes complainant that sum. Its failure to pay

³ Respondent attached a copy of the complaint in *Don Whitfield d/b/a Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513 in an effort to support its claim it did not purchase the goods. We are not impressed by its contents. Complainant can hardly be bound by a complaint in another case, particularly when that case has not been decided.

this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$91.25 with interest thereon at the rate of 13% per annum from May 1, 1983, until paid.

J-B DISTRIBUTING CO. v. CITY WIDE DISTRIBUTING, INC. PACA
Docket No. 2-6386. Decided February 19, 1985.

**Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.**

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION and ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$2,130.00 in connection with three transactions in interstate commerce involving shipments of partial truckloads of lettuce.

A copy of the report of investigation, and a supplemental report of investigation, prepared by the Department was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. Since the amount claimed as damages does not exceed \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence in the form of verified statements. Complainant filed an opening statement and a statement in reply, and respondent filed an answering statement. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership comprised of KDN Enterprises, Inc., Donald W. Moore and Henry J. Escher, doing business as J-B Distributing Co., with an address at 727 W. 7th Street, Suite 1235, Los Angeles, California.

2. Respondent, City Wide Distributors, Inc. is a corporation with an address at 2502 Charles Page Boulevard, Tulsa, Oklahoma. During the time in which the transaction in this proceeding occurred, respondent was subject to license under the Act.

3. The President of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At least immediately prior to the time of the transactions involved in this proceeding, and possibly during their occurrence, respondent was involved in an agreement between itself and City Wide Distributors of Arkansas in which respondent assumed financial responsibilities for any produce shipments shipped to Lowell, Arkansas. With respect to some transactions the produce was shipped first to Tulsa, Oklahoma. With respect to other transactions the produce was shipped to Lowell, Arkansas. Shipments were also made between the two companies from time to time.

4. With respect to each of the transactions involved in this proceeding Corry Brokerage of Memphis, Tennessee, acted as the broker.

5. Prior to the transactions involved in this proceeding complainant dealt with respondent through Corry Brokerage in a transaction which occurred prior to April 15, 1983. On April 15, 1983, respondent issued a check to complainant in the sum of \$610.00 with respect that transaction.

6. During the months of April, May, and June 1983, respondent purchased and sold fruits and vegetables in the course of interstate commerce in quantities sufficient to require it obtain a license under the Act.

7. On April 20, 1983, complainant sold to respondent, and shipped in interstate commerce, 100 cartons of lettuce, each carton containing 30 lbs., at \$4.50 per carton, for a total price of \$450.00. In addition, there was a charge of \$.80 per carton for vacuum cooling and palletizing for total charge of \$80.00, plus \$20.00 for brokerage for a total contract price of \$550.00, f.o.b. Complainant issued an invoice on April 25, 1983, which showed that the goods were sold to respondent. Corry Brokerage issued a broker's memorandum with respect to this transaction which show that the respond-

ent was the purchaser. Respondent did not complain until after the reparation complaint was filed that it was not the purchaser.

8. On June 2, 1983, complainant sold to respondent, and shipped in interstate commerce, 100 cartons of lettuce, each carton containing 24 lbs., at \$4.00 per carton, for a total price of \$400.00. In addition, there was a charge of \$.70 per carton for vacuum cooling for a total charge of \$70.00, plus \$20.00 for brokerage, for a total contract price of \$490.00, f.o.b. Corry Brokerage issued a broker's memorandum with respect to this transaction which showed that the respondent was the purchaser. Complainant issued an invoice on June 6, 1983, which showed that the goods were sold to respondent. Respondent did not complain until after the reparation complaint was filed that it was not the purchaser.

9. On June 8, 1983, complainant sold to respondent, and shipped in interstate commerce, 100 cartons of lettuce, each carton containing 24 lbs., at \$10.00 per carton, for a total price of \$1,000.00. In addition, there was a charge of \$.70 per carton for vacuum cooling for a total charge of \$70.00, plus \$20.00 for brokerage, for a total contract price of \$1,090.00 f.o.b. Corry Brokerage issued a broker's memorandum with respect to this transaction which showed that the respondent was the purchaser. Complainant issued an invoice on June 13, 1983, which showed that the goods were sold to respondent. Respondent did not complain until after the reparation complaint was filed that it was not the purchaser.

10. A formal complaint was filed on July 11, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant con-

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillee Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.* PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard*

Continued

tends that dealing through Corry Brokerage it sold to respondent in three transactions transpiring between April 20, 1983, and June 8, 1983, partial truckloads of lettuce which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$2,130.00. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period of April through June 1983, respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing in quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of lettuce involved in the transaction which occurred on April 20, 1983, i.e. 100 thirty pound cartons, in and of itself equals more than one ton, thereby meeting the requirement of the regulations. In addition, the quantity of goods purchased in the 18 proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of

Produce Distributors, Inc. v. City Wide Distributors, Inc., PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce a year have been met.

Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that for the period April through June 1983, respondent was "conducting a business requiring a license under the Perishable Agricultural Commodities Act." It based its conclusion on records in respondent's files which showed that there were many out-of-state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based upon the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the lettuce. It is uncontroverted that on April 15, 1983, complainant paid \$610.00 to respondent with respect to a prior transaction in interstate commerce involving the sale of fruit or produce. There can be no question in this regard because on that date respondent issued its check in the amount of \$610.00 to complainant with respect to an earlier related transaction, and did not deny that such was the case. In a letter to the Department of Agriculture Arthur M. Zurhorst, the owner of Corry Brokerage, stated as follows:

Mr. Ken Barnes of City Wide, Tulsa, Oklahoma, formed a partnership in Lowell, Arkansas. From the onset it was made clear that due to the history of failure in the Lowell area, I would be unable to secure credit for them unless the Tulsa operation was able to establish a line of credit through the Blue Book and assume all financial responsibility for all shipments into Tulsa and Lowell. Mr. Barnes clearly understood, submitted his financial statements to the Blue Book and established his line of credit.

I further advised Mr. Barnes that all the bills would be sent to his Tulsa office from where they would have to be paid whether I was instructed to have the merchandise delivered to Tulsa or Lowell. During the course of our business transactions some deliveries were made to Tulsa, and some to Lowell, with some merchandise being internally shipped between the two on their own trucks.

Although in its answer respondent denied that it had any involvement with respect to the transactions in issue in this proceeding, it is clear that prior to these transactions respondent did pay complainant for produce purchased and received in a check dated April 15, 1983. While that fact, and the statement of Corry Brokerage do not prove that respondent actually purchased and received the lettuce involved in this proceeding, they do show that there was a course of conduct on the part of respondent on which both the broker and complainant relied, in which respondent at least undertook to make payments on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. Respondent never denied that it did this. Neither did respondent show that it ever repudiated this alleged agreement, and conveyed such repudiation to Corry Brokerage. Furthermore, as an ostensible neutral third party in this proceeding the word of the broker is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T. J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing broker's memoranda which show respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. Therefore, based on the facts discussed above we have no alternative other than to find that respondent at least assumed liability for payment with respect to the three transactions involved in this proceeding, and that both Corry Brokerage and complainant had a right to rely on those representations.

Having found that respondent made representations on which both Corry Brokerage and the complainant were entitled to rely as regards payment for the produce that was shipped we must determine whether respondent is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transaction herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least never repudiated that relationship. Furthermore, respondent held itself out as the buyer to complainant, and never repudiated that understanding. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its action, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to for reimbursement. The *G. Fava Co. v. Park Hill Produce*

Company and/or Frank Fernandez, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that none of the produce was ever delivered to it, we find based upon a preponderance of the evidence that complainant sold the goods to respondent, and that respondent either actually received the goods or received constructive delivery of them. We are particularly impressed by the fact that all the pertinent documents in this proceeding, i.e. complainant's invoices and Corry Brokerage's memoranda of sale, reflect that the delivery was to be to respondent in Tulsa, Oklahoma. Presumably, respondent received copies of both the invoices and the broker's memoranda of sale. At least it never denied in a sworn statement that it did. If respondent truly were not involved in these transactions, having previously induced Corry Brokerage and the complainant believe that it was the receiver of goods in a related transaction, and having paid for those goods, respondent necessarily had to notify both those parties immediately upon receipt of the document that it did not receive or accept the produce. Otherwise, its action was misleading to both. Rather than do this, respondent did not take any action to deny the existence of these contracts until the Department of Agriculture undertook an investigation with respect to these matters. On July 20, 1983, Mr. Leslie S. Hauger, Jr., the attorney for respondent, wrote Mr. Joseph E. Ward, the Director of the Southwestern Region of the Regulatory Branch of the Fruit and Vegetable Division, United States Department of Agriculture, in Fort Worth, Texas, and told him that respondent did not purchase or receive the goods. This was three months after the first transaction involved herein occurred, and six weeks after the last transaction occurred. This is simply too late for respondent to deny its involvement with respect to the several transactions. Immediate action would have permitted complainant and Corry Brokerage to avoid further sales, and secondly, to try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent has not paid complainant \$2,130.00 which complainant claims is due as the result of the three transactions discussed above. Based upon our discussion, above, we find respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$550.00 with interest thereon at the rate of 13% per annum from May 1, 1983, until paid. Furthermore, within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$1,580.00 with interest thereon at the rate of 13% per annum from July 1, 1983, until paid.

VANCO PRODUCTS CO., INC. *v.* MAGIC CITY PRODUCE COMPANY, INC.
PACA Docket No. 2-6554. Decided February 20, 1985.

Accord and satisfaction—Dismissed.

Andrew Y. Stanton, Presiding Officer.

Complainant, *pro se*.

John P. Whittington, Birmingham, Alabama, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$453.72 in connection with a shipment of garlic in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer was unverified and, therefore, is not considered part of the evidence. The parties were also given an opportunity to submit additional evidence in the form of

verified statements as well as to file briefs. Complainant elected not to submit any additional evidence. Respondent initially elected not to submit any additional evidence but, after the time for filing evidence was completed, respondent filed a petition to reopen and submit evidence. Respondent's petition to reopen was granted and its evidence admitted. Complainant was given an opportunity to respond to the evidence filed by respondent, but elected not to do so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Vanco Products Co. Inc., is a corporation whose address is 2916 Delafield, Houston, Texas.

2. Respondent, Magic City Produce Company Inc., is a corporation whose address is P.O. Box 5561, Birmingham, Alabama. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On April 6, 1983, complainant sold to respondent 13 cases of fresh garlic for a total contract price of \$702.00. The garlic was shipped in interstate commerce to respondent, which accepted it.

4. On December 27, 1983, respondent's attorney sent a letter to complainant along with a check issued to complainant dated December 27, 1983, in the amount of \$248.28. The letter stated, among other things, that the check was being tendered in full settlement of any claim complainant might have against respondent, and if complainant was not interested in accepting the check under such conditions, it should return it. The check also contained a handwritten notation reading "Payment in Full". Upon receipt of these documents, complainant deposited respondent's check in its account.

5. An informal complaint was filed on January 9, 1984, which was within nine months from when the alleged cause of action herein accrued. A formal complaint was subsequently filed on March 27, 1984.

CONCLUSIONS

Respondent does not deny purchasing, receiving and accepting the garlic from complainant, as is alleged in the complaint. However, respondent contends that complainant accepted its check for 248.28 in full settlement of the matter. Complainant seeks the difference between the purchase price of the garlic, \$702.00, and the 248.28 paid by respondent, or \$453.72.

On the basis of the evidence in the record, it is clear that an accord and satisfaction occurred, releasing respondent from any further liability. An accord and satisfaction takes place when there

is a bona fide dispute between the parties as to the amount due, and there is a tender of payment of the disputed amount. The payment must be accompanied by such acts and declarations as amount to a condition that such payment, if accepted, is accepted in full satisfaction. Upon the acceptance of such payment, an accord and satisfaction occurs. *Six L's Packing Company Inc. v. Preciosa Packing House, Inc.*, 41 Agric. Dec. 1233 (1982). The December 27, 1983, letter from respondent's attorney and the handwritten notation on respondent's December 27, 1983, check for \$248.28 state clearly that the check is intended as payment in full of respondent's indebtedness arising from the garlic purchase. Complainant accepted the check without reservation, thus creating an accord and satisfaction. Accordingly, there is no merit to the complaint, and it must be dismissed.

ORDER

The complaint is hereby dismissed.

SALINAS LETTUCE FARMERS COOPERATIVE U. GREGORY A. PLASKETT
d/b/a PACIFIC VALLEY PRODUCE. Paca Docket No. 2-6483. De-
cided February 20, 1985.

Breach of warranty—Dismissed.

Edward M. Silverstein, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation in the amount of \$2,250.00 in connection with one transaction, in interstate commerce, involving lettuce and asparagus, each being a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) has been followed. Pursuant to this proce-

ture, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant also filed a statement in reply. In addition, complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Salinas Lettuce Farmers Cooperative, is a corporation whose mailing address is P.O. Box 2176, Salinas, California 93902.

2. Respondent, Gregory A. Plaskett, is an individual doing business as Pacific Valley Produce Co., whose mailing address is P.O. Box 1688, Salinas, California 93902. At all material times, respondent was licensed under the Act.

3. On May 6, 1983, in the course of interstate commerce, complainant, by oral contract, sold to respondent 750 cartons of lettuce at an f.o.b. price of \$10.00 per carton (\$7,500.00) plus 65 cents per carton for cooling (\$487.50); and 25 cartons of asparagus at an f.o.b. price of \$20.00 per carton (\$500.00) plus 65 cents per carton for cooling (\$16.25), and \$22.50 for a Ryan temperature recorder, for a total f.o.b. price of \$8,526.25. On that same date, the complainant loaded the produce on board a truck sent to its loading dock by the respondent. Loading was completed at 10:30 p.m. When it loaded the asparagus and lettuce on board the truck, complainant included two Ryan temperature recorders with the produce. Prior to picking up the produce at complainant's location, at respondent's request, the trucker had already loaded on board the truck carrots, artichokes, and bunched radishes. On the next day, May 7, 1983, on respondent's instructions, the trucker picked up beet tops, rhubarb, and Brussels sprouts, from a shipper other than complainant, in order to complete his loading. Loading of these commodities was completed before noon. Subsequent to loading this last lot of produce, the trucker left California for North Carolina.

4. On May 6, 1983, at approximately 4:00 p.m., a shipping point inspection was completed on a lot of lettuce containing 5,280 cartons. The inspector noted the grade as U.S. No. 1, and further noted the following, "Averages 50% hard, 39% firm, 11% fairly firm. Defects average within tolerance". The lettuce which complainant shipped to respondent came from this lot.

5. The truck arrived at respondent's customer, Winn-Dixie Stores, Inc., in Raleigh, North Carolina, at about 7:00 a.m. on May 11, 1983. Unloading of the produce in the truck began about 10:00

a.m. At that time, the refrigeration unit in the truck was shut off and the doors left open. After finding the lettuce in unacceptable condition, the respondent's customer called for a federal inspection, which was begun at about 1:05 p.m. that day. From the time the inspection was requested until the time that the inspection began, the lettuce was left partially unloaded on the Winn-Dixie Store's loading dock or in the truck with the refrigeration unit not running and the rear doors opened. The temperature on the loading dock was around 55°F.

6. The inspection certificate issued subsequent to the aforementioned federal inspection (E 202096) indicates that the mechanical refrigeration unit on the truck was not running, and that the rear doors were opened. It further indicates that the lettuce was partially unloaded, and that the inspection was limited to the rear six stacks and three upper layers of the lettuce remaining on board the truck as well as the lettuce which had already been unloaded off the truck. The certificate indicates that the temperature of the lettuce was as follows: "Bottom 53°F., top 40°F., Middle 44°F.". It further indicates that the condition of the lettuce was as follows:

Heads or portions of head not affected by condition defects are fresh and crisp. *Wrapper leaves*: Averages 2% decay affecting wrapper leaves only. *Head leaves*: Averages 1% damage by russet spotting. Averages 2% damage by discoloration following bruising. Decay ranges 1 to 5 heads in most cartons, many cartons none, averages 7% Bacterial Soft Rot and Gray Mold Rot in various stages.

7. On May 20, 1983, Ryan Instruments Inc., P.O. Box 599, Kirkland, Washington 98033, sent the respondent the following letter:

Ryan #334677 returned to our Kirkland plant on May 13, 1983. Upon testing, it was determined that the temperature sensor was reading 1.9° low at 35°F. The chartdrive mechanism was accurate as to time.

Ryan #340704 also returned on May 13, 1983. It was also found to be reading 1.9° low at 35°F. The chartdrive mechanism was accurate as to time.

In view of this, we believe the instruments functioned properly during the trip. If we may be of further assistance, please advise.

8. The tape from Ryan instrument No. 334677 indicates that the temperature on board the truck remained below 40° throughout the trip. No copy of the tape from Ryan instrument No. 340704 was

included within the record of this proceeding. However, the trucker indicates that the tape from that machine was within $\frac{1}{2}^{\circ}$ of No. 334677.

9. Because of the arrival condition of the lettuce, the respondent gave its customer, Winn-Dixie Stores, Inc., a \$3.00 per carton (\$2,250.00) allowance on the lettuce.

10. The formal complaint was filed on December 5, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Since respondent received and accepted the lettuce, it is responsible to complainant for the full contract price thereof, less provable damages resulting from a breach of contract committed by complainant. *Ice Produce v. Michelian Sales*, 29 Agric. Dec. 150 (1970). In the instant case, respondent has alleged such a breach. As the party alleging a breach of contract by complainant, the respondent has the burden of proving such a breach by a preponderance of the evidence. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). Concomitant therewith, respondent has the burden of proving that transportation services and conditions were normal. *Valley Packing Co. v. Nicholas J. Zerillo, Inc.*, 28 Agric. Dec. 1352 (1969).

It is clear that the lettuce did not meet the Department's good delivery standards upon arrival. See 7 CFR § 46.44(a)(2). The sole question therefore, since this was an f.o.b. transaction, is whether the poor arrival condition of the lettuce was caused by the complainant, or whether it was caused by an intransit condition. The Ryan tape which is made part of the record of this proceeding indicates that temperature throughout the trip was under 40°F. Such a temperature is within the range of temperatures in which lettuce should be carried. Moreover, the company which supplied complainant with the temperature recorder, Ryan Instruments, Inc., indicates that the recording instruments were properly calibrated. Furthermore, none of the other produce loaded on board the truck appears to have been in poor condition upon arrival. In view of the above facts, we cannot say that there was abnormal transportation services and conditions. In addition, complainant's claim that the shipment was delayed a whole day while another lot of produce was loaded on board the truck is not meritorious. The complainant did not finish loading the lettuce and asparagus on board the truck until 10:30 p.m. on May 6, 1983. The trucker indicates that he completed loading the truck by noon on the next day. In view of this, at best, the load was only delayed about 12 hours. Such a delay should not have caused the lettuce to go bad had it been properly

precooled and been in good shipping condition when it was loaded on board the truck.

Since we have found that there were no abnormal shipping conditions, the complainant's warranty of suitable shipping conditions is maintained in effect. And as the lettuce failed to make good arrival, we must hold that complainant breach its contract with respondent. As a result thereof, respondent is entitled to damages. The measure of damages for breach of warranty as to accepted goods is the difference at the time and place of delivery between the value of the goods delivered and the value they would have had if they had been as warranted. U.C.C. Section 2-714; *Ritepak Produce v. Green Grove Markets*, 29 Agric. Dec. 165 (1970). We accept the value of the goods delivered as being \$7.65 per carton or \$5,737.50, which is the price agreed upon between respondent and its customer. The contract price of the lettuce was \$7,987.50. Respondent's damages are therefore, \$2,250.00. This is the amount that the respondent has withheld from complainant.

On the basis of all of the evidence in the case, we hold that complainant breached the parties' contract, and that it, therefore, suffered no damages. Consequently, the complaint must be dismissed.

ORDER

The complaint is dismissed.

HM DISTRIBUTORS v. VAN BUREN COUNTY FRUIT EXCHANGE OF FLORIDA INC. PACA Docket No. 2-6557. Decided February 20, 1985.

Acceptance of commodity—Suitable shipping condition—Breach of warranty—
Resale awarded.

Andrew Y. Stanton, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,172.63, in connection with a lot of cucumbers sold and shipped in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were also given an opportunity to submit additional evidence in the form of verified statements as well as to file briefs, but declined to do so.

FINDINGS OF FACT

1. Complainant, HM Distributors, is an individual, Humberto J. Monteverde, whose address is P.O. Box 548, Nogales, Arizona.

2. Respondent, Van Buren County Fruit Exchange of Florida Inc., is a corporation whose address is P.O. Box 1029, Pompano Beach, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On March 31, 1983, complainant sold to respondent 180 crates of select cucumbers at \$19.90 per crate plus \$.50 per crate palletizing, for a total contract price of \$3,672.00, f.o.b. The contract was made through a broker, Joe James, Inc., Nogales, Arizona, with whom all negotiations occurred. Shipment was to be made to respondent's customer in Belle Vernon, Pennsylvania.

4. On March 31, 1983, the cucumbers were shipped in interstate commerce from complainant to Belle Vernon, Pennsylvania, where they arrived on April 4, 1983. On April 4, 1983, respondent was informed that its customers had rejected the cucumbers. That same day, respondent spoke to the broker over the telephone and stated that there were problems with the load. The broker urged that respondent secure an inspection. During this conversation, respondent did not specifically state that it desired to reject the cucumbers.

5. Respondent had the cucumbers shipped to Pittsburgh, Pennsylvania, where they were inspected at 12:10 p.m. on April 4, 1983. The inspection found as follows, in relevant part:

Products Inspected: CUCUMBERS in wirebound crates labeled "Paris" Precooled Cucumber, 1½ Bu., Grown In Mexico, H.M. Distributors, Nogales, Arizona.

Applicant states 222 wirebound crates.

Condition of Pack: Tight.

Temperature of Product: Various locations: 42°F. to 46°F.

Condition: Generally fresh and firm. Decay from 2 to 8% in most samples, none in some samples, average 4%, Bacterial Soft Rot, in various stages, mostly advanced.

Remarks: Applicant states lot was unloaded from a trailer under lot #1049.

6. At sometime subsequent to the inspection, respondent called the broker and informed it of the inspection results. Respondent did not specifically state that it wanted to reject the cucumbers.

7. On April 4, 1983, respondent turned the cucumbers over to Gullo Produce Company Inc., Pittsburgh, Pennsylvania, for consignment handling. Gullo Produce Company Inc. remitted net proceeds of \$1,147.37.

8. On May 19, 1983, respondent sent complainant a letter, accompanied by a check for \$499.37. Respondent also sent complainant the recap of sales prepared by Gullo Produce Company Inc., with handwritten additions made by respondent. The recap of sales shows that the 180 cartons of cucumbers were sold as follows: four at \$22.00 per crate, 27 at \$20.00 per crate, 29 at \$10.00 per crate, 46 at \$7.00 per crate, two at \$5.00 per crate, 16 at \$4.00 per crate, five at \$3.00 per crate, five at \$2.00 per crate, 18 for \$10.00, and 28 dumped, for gross proceeds of \$1,349.00. Subtracted from this sum were \$33.00 for inspection and \$168.63 for commission, resulting in net proceeds of \$1,147.37. No dates of sale were noted. Respondent wrote on the recap that it deducted an additional \$612.00 for freight on the resale and \$36.00 for brokerage, leaving \$499.37. Respondent remitted this sum to complainant, which accepted it as partial payment without prejudice.

9. Respondent has failed to pay complainant the difference between the \$499.33 remitted and the invoice price of \$3,672.00, or \$3,172.63.

10. An informal complaint was filed on September 28, 1983, which was within nine months from when the cause of action herein accrued. A formal complaint was subsequently filed on March 23, 1984.

CONCLUSIONS

Respondent denies any liability, claiming that there was a breach of contract by complainant because of the poor condition of the cucumbers upon their delivery at the place of business of respondent's customer. Respondent also appears to be claiming that rejected the load.

The first issue is whether there was a rejection by respondent. Complainant denies having heard of any problem until April 14,

1983, when the broker called and informed it of the results of the April 4, 1983, inspection. Respondent contends that on April 4, 1983, it told the broker that its customer had rejected the load and that there were problems with it. According to respondent, the broker advised respondent to secure an inspection, which it proceeded to do. Respondent asserts that it called back the broker that same day, April 4, 1983, told him of the inspection results, and said that it would try to resell the cucumbers in Pittsburgh, Pennsylvania. However, the broker, in a November 9, 1983, letter to the Department, states that on April 4, 1983, respondent merely informed him that there were problems, and asserts that it never received any inspection results until April 14, 1983. The broker's version of events is usually given great weight because of its presumed lack of bias. Accordingly, we conclude that respondent failed to give any notice of rejection concerning the load of cucumbers at issue. Therefore, respondent is considered to have accepted the load.

Having accepted the cucumbers, respondent is liable for the contract price, less damages, due to any breach of warranty. Respondent has the burden of proving both the breach and damages by a preponderance of the evidence. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983).

The cucumbers were subjected to a federal inspection on April 4, 1983, which resulted in a finding of four percent decay, mostly in advanced stages (Finding of Fact 5). This constitutes a breach of complainant's suitable shipping condition warranty (see 7 C.F.R. 46.43(j)). As damages resulting from the breach, respondent is entitled to the difference between the value of the cucumbers, at the time and place of acceptance, if they had been as warranted, and their actual value. The value of the cucumbers as warranted at the time and place of acceptance is best determined by the Market News Service Reports listings at Pittsburgh, Pennsylvania, for April 4, 1983, which show cucumbers such as those involved herein at \$29.00 to \$30.00 per crate. At \$29.00 per crate, the 180 cartons of cucumbers had a value, as warranted, of \$5,220.00. The actual value of the cucumbers is usually determined by the results of a prompt and proper resale. See *Homestead Tomato Packing Co., Inc. v. Austin J. Merkel Co., Inc.*, 40 Agri. Dec. 1587 (1981). Respondent claims that it turned the cucumbers over to Gullo Produce Company Inc., which remitted \$1,147.37. In the recap of sales of Gullo Produce Company Inc., none of the 180 crates are shown as having been sold for \$29.00, the value of the cucumbers if they had been as warranted, and only four crates are shown to have been sold in excess of \$20.00 per crate. Most of the cucumbers were sold at \$7.00 per crate (Finding of Fact 8). Even cucumbers with an average of

four percent decay, as here, should have sold for substantially more. Therefore, we conclude that respondent's resale was not prompt and proper. The Pittsburgh Market News Service Reports for April 4, 1983, does indicate the value of "ordinary" cucumbers at \$20.00 to \$23.00 per crate. We believe that the cucumbers at issue here were in an "ordinary" condition as described in the Market News Service Reports, and that the figure of \$20.00 per crate is an accurate representation of the actual value of the cucumbers on April 4, 1983. Therefore, at \$20.00 per crate, the actual value of the cucumbers was \$3,600.00. Deducting this sum from \$5,220.00, the value of the cucumbers if they had been as warranted, leaves \$1,620.00 as respondent's damages. The difference between the contract price of \$3,672.00 and respondent's damages of \$1,620.00 is \$2,052.00. Respondent has already paid \$499.37. Respondent is, thus, liable for an additional \$1,552.63, and its failure to pay this sum to complainant is a violation of Section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within thirty (30) days from the date of this Order, respondent shall pay to complainant, as reparation, \$1,552.63, with interest thereon at the rate of 13% per annum from May 1, 1983, until paid.

SUN WORLD INTERNATIONAL, INC. v. M.G. SYRACUSE & SONS PRO.
INC. PACA Docket No. 2-6566. Decided February 20, 1985.

Acceptance—Breach of contract, burden of proof—Suitable shipping condition—
breach not established—Commercial unit.

Where respondent accepted a shipment of plums and nectarines, he must prove a breach of the contract and damages by a preponderance of the evidence in order to prevail. Respondent's evidence that the plums failed by one percent to grade U.S. No. 1 was insufficient to prove that the complainant failed to ship the produce in suitable shipping condition in an F.O.B. contract. Acceptance of part of a load constitutes acceptance of the entire load. Resale constitutes proof of acceptance.

Lward M. Silverstein, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A

timely complaint was filed in which complainant seeks \$2,465.70 in connection with a transaction in interstate commerce involving plums and nectarines, both perishable agricultural commodities.

Copies of the Department's report of investigation were served on both parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. Moreover, the respondent filed a counterclaim against complainant in the amount of \$816.60 in connection with the same transaction.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice was followed. Under this procedure the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements, however, neither party did so. Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Sun World International, Inc., is a corporation whose mailing address is 5544 California Avenue, Bakersfield, California 93309-1698.

2. Respondent, M. G. Syracuse & Sons Pro., Inc., is a corporation whose mailing address is 1345 Rutherford Road, Greenville, South Carolina 29609-3196.

3. At all material times, both parties were licensed under the Act.

4. On July 5, 1983, in the course of interstate commerce, complainant, by oral contract, sold to respondent 240 cartons of nectarines at an f.o.b. price of \$6.00 per carton (\$1,440.00), and 720 cartons of plums at an f.o.b. price of \$8.00 per carton (\$5,760.00), plus 55 cents per carton for pre-cooling (\$528.00), and 15 cents per carton for palletization (\$144.00), for a total agreed f.o.b. contract price of \$7,872.00. On that same date, the complainant shipped the produce to the respondent. The produce arrived in Greenville, South Carolina on Saturday, July 9, 1983. The respondent was dissatisfied with the arrival condition of the plums. Thereafter, several telephone conversations were made between the parties, sometimes through the offices of the broker in the transaction, Spratte-Shelnutt, Inc., Administration Building, State Farmer's Market, Forest Park, Georgia 30050. As no Federal inspection could be had on the Saturday, July 9, 1983, arrival date of the produce, the parties agreed that respondent would unload the plums pending a Federal inspection on the following Monday. On Monday, July 11,

1983, at 10:00 a.m., the plums were inspected. The inspection certificate issued following that inspection (F 079654) indicates that the plums were stacked on pallets in the respondent's cold storage room, that the temperature of the plums ranged from 36 to 38°F., and that the quality of the plums was as follows: "Clean, mature, generally well formed. Grade defects range from 3 to 9%, average 6%, generally scars, misshapened and skin punctures." The inspector noted the condition of the plums as follows:

Mostly hard, some firm, with 50% to full surface medium to dark red color. Ranges from 3 to 11%, average 6% serious damage by soft fruit. Ranges from 2 to 7%, average 4% damage including 1% serious damage by dark brown to black surface discoloration. Less than 1% decay.

In addition, the inspector noted the grade of the plums as follows: "Meets quality requirements but fails to grade U.S. No. 1 only account condition."

5. Subsequent to the above noted inspection, the respondent, through the offices of the broker, attempted to have the complainant move the plums elsewhere, but complainant either would not or was not able to do so. Complainant offered respondent a \$1.50 per carton allowance, but respondent refused to accept this. On July 14, 1983, when negotiations between the parties apparently completely terminated, the respondent notified complainant that it would sell the plums for complainant's account. On July 14, 1983, the broker sent the complainant the following telegram:

CONFIRM TELEPHONE CONVERSATION THIS DATE AND PREVIOUS PHONE CONVERSATIONS OF JULY 9th, 11th, 12th, AND 13th, 720 LUGS OF PLUMS ARRIVED ON SATURDAY JULY 9 WITH PROBLEMS. AS NO USDA INSPECTOR TO BE CONTACTED SYRACUSE UNLOADED WITH YOUR PERMISSION, PENDING OUTCOME OF INSPECTION. AFTER INSPECTION MADE ON JULY 11th, YOU WERE NOTIFIED OF RESULTS AND ADVISED THAT SYRACUSE WOULD NOT BE ABLE TO MOVE PLUMS THROUGH REGULAR CHANNELS DUE TO CONDITIONS. AND ASK THAT YOU PLACE PART OR ALL ELSEWHERE AT THAT TIME YOU ADVISED THAT YOU WOULD ALLOW A \$1.50 PER LUG ALLOWANCE. SYRACUSE ADVISED THAT HE WOULD NOT SETTLE AT THAT PRICE AND AGAIN ASKED THAT YOU MOVE PLUMS ELSEWHERE. THIS WAS DISCUSSED ON WEDNESDAY JULY 13th AND ALSO ON JULY 14th. SYRACUSE NOW

ADVISES THAT HE WILL SELL FOR YOUR ACCOUNT
FOR THE BEST POSSIBLE PRICE IN THE GREEN-
VILLE SOUTH CAROLINA AREA MARKET.

6. During the period July 11, 1983, through July 21, 1983, respondent sold 674 of the 720 cartons of plums at prices ranging from \$7.00 per carton to \$12.75 per carton (average price \$8.51) for a total of \$5,736.15. The disposition of the remaining 46 cartons of plums is unknown.

7. On or about August 2, 1983, the respondent submitted an accounting to the complainant for the entirety of the shipment. The accounting indicated that respondent sold 674 lugs of plums at an average price of \$8.05 per lug (\$5,425.70). Respondent deducted therefrom \$1.00 per carton for handling (\$674.00), and \$2.10 per carton for freight (\$1,415.40), and reported a return of \$3,336.30 as to the plums. Further, respondent paid complainant \$1,440.00 for the 240 cartons of nectarines, \$528.00 for pre-cooling, and \$144.00 for palletization. Respondent also deducted the cost of the federal inspection (\$42.00). Respondent submitted a check to the complainant in the amount \$5,406.30.

8. The formal complaint was filed on March 7, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

We must first decide whether the respondent accepted the load of plums and nectarines. It must be held that respondent did accept them because it admits accepting the nectarines which were part of the commercial unit making up the shipment. Thus, it must be held that it also accepted the plums. 7 CFR section 47.43(ii); *Salinas Lettuce Farmers Coop. v. Larry Ober Co.*, 39 Agric. Dec. 65 (1980). Also, respondent must be determined to have accepted the plums because it began selling them on July 11, 1983, prior to the time when the negotiations between the parties regarding the nectarine's disposition fell apart, thereby indicating that it was accepting dominion and control over them. *Bates Potato Co. v. I. Kallish & Sons*, 18 Agric. Dec. 1301 (1959).

Since we hold that respondent accepted the full shipment of produce, the next issue with which we must deal is whether the respondent is entitled to damages resulting from a breach of contract committed by the complainant. The respondent has the burden of proving such a breach and the damages resulting therefrom by a preponderance of the evidence. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). We hold that that respondent has failed to prove that the complainant breached the parties' contract. In support of its position that there was a breach, the respondent

offers the July 11, 1983, inspection certificate. However, the damage reported on that certificate indicates that the reason why the plums failed to grade U.S. No. 1 at the time of the inspection was that the shipment exceeded the tolerance for serious damage by only 1%. See 7 CFR § 51.1525(a)(2). Such a small variation from the tolerance is insufficient in an f.o.b. sale to warrant a holding that the shipper failed to ship produce in suitable shipping condition. See, *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

In view of the above, the respondent was obligated to complainant for the full agreed f.o.b. contract price or \$7,872.00. It has paid complainant only \$5,406.30. Therefore, respondent still is obligated to complainant in the amount of \$2,465.70. Respondent's failure to pay complainant the \$2,465.70 is a violation of Section 2 of the Act for which reparation plus interest should be awarded. Further, in view of the above, the respondent's counterclaim should be dismissed.

ORDER

Within 30 days from the date of this Order, the respondent shall pay complainant \$2,465.70, as reparation, with interest thereon at the rate of 13 percent per annum from August 1, 1983, until paid.

The counterclaim is dismissed.

TEIXEIRA FARMS, INC. v. CITY WIDE DISTRIBUTORS, INC. PACA
Docket No. 2-6479. Decided February 20, 1985.

Failure to pay—Jurisdiction—Failure to meet burden of proof—Dismissal.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Jessie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$724.95 in connection with the sale of two partial truckloads of produce in intersate commerce.

A copy of the report of investigation, and a supplemental report of investigation, prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent.

ent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement. Respondent filed an answering statement. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Teixeira Farms, Inc., is a corporation with an address at 2600 Bonita Lateral Road, Santa Maria, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Blvd., Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At one point Mr. Barnes agreed with Mr. Laite that respondent would advance money to City Wide Distributors of Arkansas for the purchase of produce since the latter corporation lacked operating capital. Respondent admitted that "upon receipt of produce allegedly purchased by the Arkansas Corporation, the undersigned requested the Respondent Corporation to pay such invoices, and to then invoice the Arkansas Corporation for the sums advanced. When the Arkansas Corporation failed to reimburse the respondent Corporation, this practice was terminated." However, respondent did not make any statement in the record as to when or how the practice of making such payments was terminated.

4. During the time of the transaction involved in this proceeding respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On May 27, 1983, complainant sold in interstate commerce 150 cartons of lettuce, for a total price \$652.50, f.o.b., including cooling and brokerage. It issued an invoice which showed that respondent was the buyer.

6. On June 3, 1983, complainant sold in interstate commerce nine cartons of cauliflower for a total price of \$72.45, f.o.b., including

cooling and and brokerage. It issued an invoice and bill of lading which showed that respondent was the buyer.

7. A formal complaint was filed in this proceeding on January 3, 1984, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant contends that dealing through Corry Brokerage it sold to respondent in two transactions lettuce and cauliflower which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$724.95. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillie Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6486; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period of the transactions respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of goods purchased in the 18 proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased produce totaling at least 2,000 pounds during the period April through June, 1983. In addition, the quantity of goods purchased in those 18 proceedings is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that respondent was, during the time of this transaction, conducting a business requiring a license under the Perishable Agricultural Commodities Act. It based its conclusion on records in respondent's files which showed that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or whole saler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the produce. As the party claiming that respondent purchased and received the lettuce and cauliflower, complainant has the burden of proof to show that such was the case. *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973). Based on this record we find that complainant has failed to sustain its burden of proof. Although complainant claims to have sold the produce through

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchased at least \$230,000.00 worth of produce in a year have been met.

Corry Brokerage, it has failed to provide the usual broker's memorandum for each sale, which documents would show the terms of sale, and to whom the goods were sold. In a case such as this, where respondent hotly contests the claim that it purchased and received the goods, it is important that there be provided stronger evidence than invoices and bills of lading to show that respondent was the purchaser. Documents prepared by the broker, an ostensibly neutral third party, provide the nexus between the seller and the respondent. They have not been provided in this case. All that was provided is a letter from Arthur M. Zurhorst of Corry Brokerage to the Department of Agriculture which was received August 17, 1983.³ Without verification of broker's memoranda we cannot accept the statements therein that Mr. Barnes would handle financial concerns in dealings in which Ralph Laite, Jr. was involved as having any probative value. Thus, complainant has neither proved that respondent purchased and received the produce or that it acted in a manner which subjected it to liability. Therefore, the complaint must be dismissed.

ORDER

The complaint is dismissed.

In re: W.H. McLEOD & SON v. THE CHARLESTON COUNTY WHOLESALE VEGETABLE MARKET, INC. PACA Docket No. 2-6707. Decided February 21, 1985.

Failure to pay—Undisputed amount.

Andrew Y. Stanton, Presiding Officer.

Complainant, pro se.

Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on April 23, 1984 and a formal complaint was filed on October 4, 1984. Complainant seeks to recover \$10,498.38 which amount is alleged to be the total purchase price for produce sold to and accepted by respondent in May and June, 1983. Respondent filed an answer to the formal complaint on

³ This document was attached to respondent's answering statement.

December 26, 1984, admitting that \$736.20 of the amount claimed by complainant was due and owing to complainant on account of the transactions involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, \$736.20. Payment of this amount shall be made within 30 days from the date of this Order with interest thereon at the rate of 13 percent per annum from July 1, 1983, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no Order for the payment of undisputed amount had been issued.

M&M PRODUCE FARMS AND SALES v. SOL SALINS INC. PACA Docket
No. 2-6525. Decided February 21, 1985.

Accord and satisfaction—Conditional tender—Breach of contract—Suitable
shipping condition—Reparation awarded.

George S. Whitten, Presiding Officer.

Complainant, *pro se*.

Howard Silberberg, McLean, Virginia, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agriculture Commodities Act, (1930), as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$2,548 in connection with a transaction in interstate commerce involving one truckload of onions.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

Since the amount claimed as damages in the formal complaint does not exceed \$15,000.00, the shortened procedure set forth in the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties together with the Department's report of investigation are considered as evidence. In addition the parties were given the opportunity to file evidence in the form of sworn statements, but neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of Matthew Rogowski, Mark Rogowski, and Sigmund Rogowski, doing business as M&M Produce Farms and Sales, whose address is R.D. #2, Goshen, New York.

2. Respondent, Sol Salins, Inc., is a corporation whose address is 1325-5th Street, N.E., Washington, D.C. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about September 14, 1983, complainant sold to respondent, and shipped from loading point in the State of New York to respondent in Washington, D.C., one truckload of straight run commercial onions as follows: 760 50 pound bags of yellow onions at \$7.00 per bag delivered and 100 25 pound bags of red onions at \$7.50 per bag delivered, or a total invoice price of \$6,070.

4. The onions were federally inspected at respondent's place of business in Washington, D. C. on September 16, 1983, at 9:00 a.m. A preliminary restricted report issued by this Department showed the following in relevant part:

APPLICANT:	Sol Salins Inc.
COMMODITY:	Yellow Onions (designated Prepack) "M&M, N.Y." Generally Firm. Dry. Decay ranges 1 to 10% in Most, More in some, Average 4% Gray Mold Rot occurring (sic) in neck and 1 to 3 scales. Red Onions: "Onions, 25 lbs" Firm. No decay.
TEMPERATURES:	51-52°F.

5. The formal complaint was filed on February 27, 1984, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent admits it purchased and accepted the onions as set forth in the findings of fact, but raises several defenses to the complaint. First, respondent alleges that the contract called for U.S. No. 1 grade onions rather than "straight run commercial onions" as claimed by complainant. Complainant attached to its formal complaint a copy of its invoice dated September 14, 1983. Respondent has not denied the receipt of this invoice, and nowhere has respondent shown that it objected to the terms of such invoice. The invoice shows the sale of the onions without any grade designation. We conclude that the onions were sold without reference to grade.

Respondent contends that there was an accord and satisfaction. In support of this contention respondent points to two documents in the Department's report of investigation. The first document is a statement which shows the yellow onions as purchased by respondent from complainant at a price of \$6.60 per bag, or \$5,016.00,¹ and also shows that 67 bags of such onions were dumped. On the statement respondent claims \$6.60 per bag for the dumped onions. In addition the statement shows: "less allowance per Matthew 693 at \$2.60 (1801.80)".² The statement shows respondent as paying the full \$7.50 per bag purchase price for the red onions and shows a net figure of \$3,522.00. The second document is a check for \$3,522.00 which contains the following wording in small print in the upper left hand corner: "THIS CHECK IS IN SETTLEMENT OF THE FOLLOWING INVOICES." Following the quoted words are spaces in which to record the dates and amounts of various invoices. All of such spaces are blank. Although the check issued by respondent was negotiated by complainant without protest, the wording on such check falls short of putting complainant on notice that the check was intended by respondent to be offered to complainant only on the condition that it be accepted in full satisfaction for the onions. We recognize that the accompanying statements imply a contention by respondent that only \$3,522.00 is

¹ In a letter to this Department, dated November 21, 1983, and included as an exhibit to the Department's report of investigation, Ronald M. Salins, president of respondent, contended that the original price of yellow onions was \$6.60 per bag. This letter was not sworn to, and in the subsequent sworn answer respondent admitted that the correct price was \$7.00.

² In the same letter referred to in footnote 1, *supra*, respondent contended that complainant agreed to an allowance of \$2.60 per bag on the yellow onions. However, this contention was not included as a defense in respondent's formal answer.

owed. However, we reiterate that the accompanying check falls short of constituting a conditional tender. We conclude that respondent's defense of accord and satisfaction fails. See *National Produce Distributors, Inc. v. Stewart Produce Company*, 21 Agric. Dec. 955 (1962).

Respondent also contends that the onions did not meet grade as to quality and condition, and that complainant therefore breached the contract of sale. Although we have previously found that respondent's contention, that the onions were sold as U.S. No. 1, is not supported by the evidence, we nevertheless must conclude that complainant did breach the contract of sale by delivering onions of inferior condition. The United States Standards for Bermuda-Granex-Grano type onions allow a tolerance of not more than 2% for onions which are affected by decay or wet sunscald and such tolerance is the same for U.S. No. 1, U.S. Combination, and U.S. No. 2 grades. (See 7 CFR § 51.3195 *et seq.*). Although the subject onions were not sold with a grade designation, the consistent maximum 2% tolerance for onions affected by decay, as disclosed by the Department's grade standards, shows that decay in onions is a critical factor affecting the merchantability of such produce. In this delivered sale, we conclude that an average of 4% decay, as shown by a federal inspection one or two days after delivery, is excessive.

Since respondent accepted the onions it became liable to complainant for the full purchase price thereof less any damages proven by respondent resulting from the breach of contract on the part of complainant. *Chiquita Brands, Inc. v. Valley Onions, Inc.* 39 Agric. Dec. 1489 (1980). However, respondent made no attempt to prove damages resulting from such breach. Respondent did not submit an accounting showing the prices which it realized from the resale of the onions. We have held many times that in the case of damaged goods, about the only way to establish their value is by prompt and proper resale. Without knowledge of the results of such a resale we have no way of computing respondent's damages in this case. See *Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979) and *Relan Produce Farms v. Rushton & Co., Inc.*, 38 Agric. Dec. 1636 (1979). We conclude that respondent's failure to pay complainant the balance of the purchase price, or \$548.00, is a violation of Section 2 of the Act for which reparation could be awarded to complainant with interest.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$2,548.00, with interest thereon at the rate 13 percent per annum from October 1, 1983, until paid.

In re: MACDONALD IMPORT CO., INC. v. MAGNOLIA FRUIT & PRODUCE Co., INC. PACA Docket No. 2-6590. Decided February 21, 1985.

Failure to prove agreement to purchase—Dismissal.

Edward M. Silverstein, Presiding Officer
Complainant, *pro se*
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks \$720.00 in connection with one transaction in interstate commerce involving ginger root, a perishable agricultural commodity.

Copies of the Department's report of investigation were served on both parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements, however, neither party did so. Moreover, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, MacDonald Import Co., Inc., is a corporation whose mailing address is P.O. Box 970134, Miami, Florida 33197.

2. Respondent, Magnolia Fruit & Produce Co., Inc., is a corporation whose mailing address is P.O. Box 18427, Houston, Texas 77028. At all material times, respondent was licensed under the Act.

3. On or about February 18, 1983, the complainant and respondent entered into an agreement whereby the complainant would

send the respondent one box of fresh ginger root as a sample. The intent of the agreement was that, should the ginger root meet the quality standards of the respondent, the respondent would enter into a purchase agreement with the complainant. On that same date, rather than ship the respondent one box of ginger root, the complainant shipped the respondent one pallet of ginger root which contained 30 boxes. The boxes of ginger root were received by the respondent. Upon inspecting them, the respondent determined that ginger root would not meet its quality standards because it was dark, dull and shriveled rather than being bright, and fully glossy with "shine." In addition, the size of the ginger root was small and broken into pieces rather than being the large full "hand sized" ginger required by the respondent. After making that determination, the respondent notified the complainant that it had shipped 30 boxes of ginger root rather than one, and further that the ginger root was not acceptable to it. The parties agreed that the respondent would store the ginger root until the complainant could place it elsewhere. However, the complainant never was able to move the 30 boxes. After some time, the condition of the ginger root had deteriorated to the point where the respondent was forced to dump all 30 boxes.

4. An informal complaint was filed on November 15, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The complainant in these proceedings has the burden of proving, by a preponderance of the evidence, all of the material allegations of its complaint. *Hol-Mex Corp. v. DiMare Bros.*, 19 Agric. Dec. 1187 (1960). In the instant case, it was therefore incumbent upon the complainant to prove that the respondent had entered into an agreement to purchase the 30 boxes of ginger root at an f.o.b. price of \$24.00 per carton as it alleged in the complaint. It has failed to do so. The only evidence which it submitted was its verified complaint to which was attached an invoice, a shipping document, and a telegram which it sent to the respondent on October 10, 1983.¹ In its verified answer, however, the respondent denies receiving the invoice, and denies ever seeing the shipping document. In that verified answer, the respondent further states that the transaction between the parties was to involve only one box of ginger root, which was to be sent to it as a sample in order for it to decide whether it

¹ In this telegram the complainant referred to the February 18, 1983, shipment as a "consignment of ginger" rather than as a sales transaction as it alleges in its complaint.

would enter into a purchase and sale agreement with the complainant. It further alleges that, rather than receiving one box, it received 30 boxes, and that the complainant refused to move the 30 boxes elsewhere when respondent complained of the poor quality of the ginger root as well as the large number of boxes which had been erroneously shipped. The complainant chose not to respond to these allegations. We must conclude, therefore, on the basis of all of the evidence in the record that the complainant failed to prove by a preponderance of the evidence that the respondent agreed to purchase the ginger root. In view of the respondent's allegations we hold that the complaint ought to be dismissed.

ORDER

The complaint is dismissed.

JACK T. BAILLIE CO., INC., v. CITY WIDE DISTRIBUTORS, INC. PACA
Docket No. 2-6424. Decided February 22, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$2,083.75 in connection with two transactions in interstate commerce involving shipments of partial truckloads of lettuce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. Since the amount claimed as damages does not exceed \$15,000.00, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence in

the form of verified statements. Respondent filed an answering statement and complainant filed a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Jack T. Baillie Co., Inc., is a corporation with an address at P.O. Box 268, Salinas, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Boulevard, Tulsa, Oklahoma. During the time in which the transaction in this proceeding occurred, respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. During the time of the transactions involved in this proceeding, respondent was involved in agreement between itself and City Wide Distributors of Arkansas in which respondent assumed financial responsibilities for any produce shipments shipped to Lowell, Arkansas. With respect to some transactions the produce was shipped first to Tulsa, Oklahoma. With respect to other transactions the produce was shipped to Lowell, Arkansas. Shipments were also made between the two companies from time to time.

4. With respect to each of the transactions involved in this proceeding Corry Brokerage of Memphis, Tennessee acted as the broker.

5. During the months of April and May 1983, respondent purchased and sold fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

6. On April 28, 1983, complainant sold to respondent in interstate commerce 175 cartons of lettuce at \$6.00 per carton, plus \$.65 per carton for cooling and \$.20 per carton for brokerage, for a total contract price of \$1,198.75, f.o.b. Complainant issued an invoice which showed that the goods were sold to respondent. Corry Brokerage issued a broker's memorandum with respect to this transaction which showed that the respondent was the purchaser. Complainant also issued a bill of lading signed by the truck driver which showed that the lettuce was to be delivered to respondent in Tulsa, Oklahoma. Respondent did not complain until an investigation was begun by the Department that it was not the purchaser. Respondent never notified complainant that it was not the purchaser.

7. On May 17, 1983, complainant sold to respondent in interstate commerce 100 cartons of lettuce at \$8.00 a carton, plus \$.65 a

carton for cooling and \$.20 a carton for brokerage, for a total contract price of \$885.00, f.o.b. Complainant issued an invoice which showed that the goods were sold to respondent. Corry Brokerage issued a broker's memorandum with respect to this transaction which showed that the respondent was the purchaser. Complainant issued a bill of lading which was signed by the truck driver which showed that the goods were to be delivered to respondent in Tulsa, Oklahoma. Respondent did not complain until after the Department of Agriculture initiated an investigation that it was not the purchaser. Respondent never notified complainant that it was not the purchaser.

8. A formal complaint was filed in this proceeding on July 28, 1983, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant contends that dealing through Corry Brokerage it sold to respondent in two transactions occurring on April 28, 1983 and May 17, 1983, partial truckloads of lettuce which were received and accepted by

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

respondent, but for which respondent has failed to make payment in the total amount of \$2,083.75. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering the other issues in this case. Based on all the evidence available in this proceeding we find that during the period April and May 1983, respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of lettuce involved in the transaction which occurred on April 28, 1983, i.e., 175 cartons of lettuce in and of itself equals more than one ton, thereby meeting the requirements of the regulations. In addition, the quantities of goods purchased in the eighteen proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that for April and May 1983, respondent was "conducting a business requiring a license under the Perishable Agricultural Commodities Act." It based its conclusion on records in respondent's files which show that there were many out of state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation of the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. 499a(b) that it purchase at least \$230,000.00 worth of produce in any year have been met.

Act, irrespective of whether it was acting as a retailer or a whole saler. .

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the lettuce. In a letter to the Department of Agriculture received on August 17, 1983, Arthur M. Zurhorst, of Corry Brokerage, states as follows with respect to these transactions:

In every case, I received the order from Ralph Laite, Jr. in their Lowell, Arkansas branch. This was done on the express authority of Ken Barnes in Tulsa who said that himself knew nothing about fresh produce so his partner in Lowell would handle all of the ordering while Mr. Barnes would handle the financial end and direct sales from the Tulsa location.

Although in its answer respondent denied that it had any involvement with respect to the transactions in issue in this proceeding, it is clear that there was a course of conduct on the part of respondent on which both the broker and the complainant relied in which respondent at least undertook to make payments on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. Respondent never denied that it did this. Indeed, it acknowledged that it made payment with respect to some goods which it asserted were purchased by City Wide Distributors of Arkansas. Neither did respondent show that it ever repudiated its agreement to pay for goods it said were purchased by City Wide Distributors of Arkansas. Nor did it convey any such repudiation to Corry Brokerage. Furthermore, as an ostensibly neutral third party in this proceeding the word of the broker is entitled to great weight. See *Homestead Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T.J. Power & Co.*, 40 Agric. Dec. 425 ____ (1981). Corry Brokerage, by issuing a broker's memorandum which showed respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. Therefore, based on the facts discussed above, we have no alternative other than to find that respondent at least assumed liability for payment with respect to the two transactions involved in this proceeding, and that both Corry Brokerage and complainant had a right to rely on those representations.

Having found that respondent made representations on which both Corry Brokerage and the complainant were entitled to rely as regards payment for the produce that was shipped, we must deter-

mine whether respondent is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for such goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transaction herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least never repudiated that relationship. Furthermore, respondent held itself out as the buyer to complainant and never repudiated that understanding. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its actions, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Parkhill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Co. v. American National Growers Corp.* 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that none of the produce was ever delivered to it, we find based upon a preponderance of the evidence that complainant sold the goods to respondent, and that respondent either actually received the goods or received constructive delivery of them. We are particularly impressed by the fact that all the pertinent documents in this proceeding, i.e., complainant's invoices and Corry Brokerage's memoranda of sale, as well as bills of lading issued by the complainant which were signed by the truckers, reflect that delivery was to be to respondent in Tulsa, Oklahoma. Presumably respondent received copies of both the invoices and the broker's memoranda of sale. At least it never denied in a sworn statement that it did. If respondent truly were not involved in this transaction, having previously induced Corry Brokerage and the complainant to believe that it was the receiver of the goods, respondent necessarily had to notify those parties immediately upon receipt of the document that it did not receive or accept the produce. Otherwise its action was misleading to both. Rather than do this respondent did not take any action to deny the existence of the contracts until the Department of Agriculture undertook an in-

vestigation with respect to these matters. On July 20, 1983, Mr. Leslie S. Hauger, Jr., the attorney for respondent wrote Mr. Joseph E. Ward, the Director of the Southwestern Region of the Regulatory Branch of the Fruit and Vegetable Division, United States Department of Agriculture, in Fort Worth, Texas, and told him that respondent did not purchase or receive the goods. This was three months after the first transaction involved herein occurred, and two months after the second transaction occurred. This is simply too late for respondent to deny its involvement with respect to the two transactions. Immediate action would have permitted complainant and Corry Brokerage to avoid further sales, and secondly to try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent also averred that the evidence shows that Corry Brokerage and Ralph Laite, Jr., of City Wide Distributors of Arkansas conspired to show complainant that respondent was the purchaser of the goods. We find nothing in this record to lead us to that conclusion. In addition, respondent attached to its brief a copy of a complaint filed by Ron Whitfield doing business as Whitfield Brokerage Company against respondent before the Department of Agriculture, PACA Docket No. 6513, which complaint is one of the eighteen similar proceedings referred to, above. It is questionable whether this document can be considered since it was not part of the evidentiary matter in this proceeding. In any event our review of the document leads us to the conclusion that it does not show that there was not any involvement on the part of City Wide Distributors of Arkansas in this proceeding.

Respondent has not paid complainant \$2,083.75 which complainant claims is due as a result of the two transactions discussed above. Based upon our discussion, above, we find that respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded complainant with interest.

ORDER

Within 30 days from the date of this Order respondent shall pay to complainant, as reparation, \$1,198.75 with interest thereon at the rate of 13 percent per annum from June 1, 1983, until paid. Furthermore, within 30 days from the date of this Order respondent shall pay to complainant, as reparation, \$885.00 with interest

thereon at the rate of 13 percent per annum from July 1, 1983, until paid.

BULL & PRICE, INC., a/t/a ALLAN BULL PRODUCE v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6462. Decided February 25, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—Reparation awarded.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$1,706.40 in connection with the sale of a partial truckload of lettuce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Respondent filed an answering statement. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Bull & Price, Inc. a/t/a Allan Bull Produce, is a corporation with an address at P.O. Box 5577, Fresno, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Blvd., Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph

Laite, Jr., is also a shareholder in that corporation. At one point Mr. Barnes agreed with Mr. Laite that respondent would advance money to City Wide Distributors of Arkansas for the purchase of produce since the latter corporation lacked operating capital. Respondent was also involved in transactions in which City Wide Distributors of Arkansas invoiced it for produce, and in other transactions in which it invoiced City Wide Distributors of Arkansas for produce.

4. During the time of the transaction involved in this proceeding respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On May 10, 1983, Complainant sold to respondent in interstate commerce 144 cartons of lettuce at \$11.85 a carton, for a total contract price of \$1,706.40, f.o.b. Corry Brokerage of Memphis, Tennessee was the broker. It issued a broker's memorandum of sale which showed that the respondent was the purchaser. Complainant issued an invoice which showed that the goods were sold to respondent. The trucker, Terminal Truck Broker, Inc., issued a billing invoice which showed that the goods were shipped to respondent in Tulsa, Oklahoma. Complainant did not notify complainant until December 29, 1983, that it was not the purchaser.

6. A formal complaint was filed on July 21, 1983, which was within nine months of the time the cause of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant con-

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillee Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms,*

Continued

tends that dealing through Corry Brokerage it sold to respondent a partial truckload of lettuce which was received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$1,706.40. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period of the transactions respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, recieved, or contracted to be shipped or received." The quantity of goods purchased in the transaction involved in this proceeding is so substantial as to warrant the conclusion that respondent purchased produce totaling at least 2,000 pounds during the period April through June, 1983. In addition, the quantity of goods purchased in those 18 proceedings is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that respondent was, during the time of these transactions, "conducting a business requiring a li-

Inc. v. City Wide Distributors, Inc., PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce in a year have been met.

cense under the Perishable Agricultural Commodities Act." It based its conclusion on records in respondent's files which showed that there were out-of-state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the lettuce. Respondent has suggested that the lettuce was bought by City Wide Distributors of Arkansas. However, it acknowledged in its brief that at least for a short period of time it had agreed to pay invoices on behalf of the Arkansas Corporation. This acknowledgment in its brief is inconsistent with respondent's claim in paragraph 8 of its Answering Statement that "At no time did I, personally or as an officer of the Respondent Corporation, guarantee the payment of invoices for produce ordered by the Arkansas Corporation." Corry Brokerage, of course, issued a broker's memorandum which shows that respondent was the purchaser. The above facts do not prove that respondent actually purchased and received the lettuce involved in this proceeding. However, they do show that there was a course of conduct on the part of respondent on which both the broker and complainant relied, under which respondent undertook to make payment on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. As an ostensibly neutral third party in this proceeding, the word of the broker, as manifested by its memoranda, is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T. J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing broker's memoranda which show respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. We find nothing in this record which might give credibility to respondent's claim that Corry Brokerage and Mr. Laite were in collusion with each other to mislead sellers of produce. Therefore, based on the facts discussed above, we have no alternative other than to find the respondent was involved with respect to the transaction in this proceeding.

Having found that respondent was involved in the transaction we must determine whether it is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transaction herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least did not repudiate that relationship until it filed its answer. Furthermore, respondent held itself out as the buyer to complainant, and did not repudiate that understanding until then. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its action, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Park Hill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that the lettuce was never delivered to it, we find based upon a preponderance of the evidence that respondent received the goods. Corry Brokerage issued a broker's memorandum of sale showing that respondent was the purchaser. Complainant also issued an invoice showing that respondent was the purchaser. Most importantly, the trucker issued a billing invoice which showed that the produce was to be delivered to respondent in Tulsa, Oklahoma. It is our conclusion that the evidence is sufficient to show that respondent did purchase the goods.

Respondent has not paid complainant \$1,706.40 with respect to the transaction discussed above. Based upon our discussion, above, we find the respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$1,706.40 with interest thereon at the rate of 13% per annum from June 1, 1983, until paid.

SEABOARD PRODUCE DISTRIBUTORS, INC. *v.* CITY WIDE DISTRIBUTORS,
INC. PACA Docket No. 2-6471. Decided February 25, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$3,471.05 in connection with the sale of nine partial truckloads of mixed vegetables in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement. Respondent filed an answering statement. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Seaboard Produce Distributors, Inc., is a corporation with an address at P.O. Box 486, Camarillo, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Blvd., Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At one point Mr. Barnes agreed with Mr. Laite that respondent would advance money to City Wide Distributors of Arkansas for the purchase of produce since the latter corporation lacked operating capital. Respondent admitted that immediately prior to the time of the transactions involved herein, and possibly when they occurred, that "upon receipt of invoices for produce allegedly purchased by the Arkansas Corporation, the undersigned requested the Respondent Corporation to pay such invoices, and to then invoice the Arkansas Corporation for the sums advanced. When the Arkansas Corporation failed to reimburse the respondent Corporation, this practice was terminated." However, respondent did not make any statement in the record as to when or how the practice of making such payments was terminated.

4. During the time of the transactions involved in this proceeding respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On April 7, 1983, complainant sold to respondent in interstate commerce 93 cartons of mixed vegetables at various prices, plus brokerage, and cooling, for a total contract price of \$928.35, f.o.b.

6. On April 19, 1983, complainant sold to respondent in interstate commerce 37 cartons of mixed vegetables at various prices, plus brokerage and cooling, for a total contract price of \$553.15, f.o.b.

7. On April 28, 1983, complainant sold to respondent in interstate commerce 37 cartons of mixed vegetables at various prices, plus brokerage and cooling, for a total contract price of \$320.65, f.o.b.

8. On May 2, 1983, complainant sold to respondent in interstate commerce 27 cartons of mixed vegetables at various prices, plus brokerage and cooling, for a total contract price of \$293.65, f.o.b.

9. On May 5, 1983, complainant sold to respondent in interstate commerce 39 cartons of mixed vegetables at various prices, plus brokerage and cooling, for a total contract price of \$344.30, f.o.b.

10. On May 9, 1983, complainant sold to respondent in interstate commerce 38 cartons of mixed vegetables at various prices, plus brokerage and cooling, for a total contract price of \$322.60, f.o.b.

11. On May 16, 1983, complainant sold to respondent in interstate commerce 33 cartons of mixed vegetables at various prices, plus brokerage and cooling, for a total contract price of \$299.60, f.o.b.

12. On May 27, 1983, complainant sold to respondent in interstate commerce 20 cartons of mixed vegetables at various prices, plus brokerage and cooling, for a total contract price of \$166.25, f.o.b.

13. On June 1, 1983, complainant sold to respondent in interstate commerce 30 cartons of mixed vegetables at various prices, plus brokerage and cooling, for a total contract price of \$188.50, f.o.b.

14. With respect to each of the transactions set forth in paragraph 5 through 13, above, Corry Brokerage of Memphis, Tennessee, was the broker.

15. With respect to each of the nine transactions complainant issued an invoice which showed that the produce was sold to respondent. It also issued bills of lading which showed for each transaction that the produce was to be delivered to respondent in Tulsa, Oklahoma. The drivers of the trucks signed the bill of lading in each transaction with the exception of the bill of lading for the transaction which occurred on April 7, 1983. Corry Brokerage issued a bill of lading for each transaction, with the possible exception of the one which occurred on May 19, 1983, which showed that respondent was the purchaser. Respondent did not complain that it was not the purchaser of the produce involved in these transactions until it filed its answer on January 31, 1984.

16. A formal complaint was filed in this proceeding on July 2, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant con-

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennus Produce Sales, Inc. v City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillee Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Gold Coast*

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tends that dealing through Corry Brokerage it sold to respondent in nine transactions mixed vegetables which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$3,471.05. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period of the transactions respondent on subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of goods purchased in the 18 proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased produce totaling at least 2,000 pounds during the period April through June, 1983. In addition, the quantity of goods purchased in those 18 proceedings is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that respondent was, during the time of this

Packing, Inc. v. City Wide Distributors, Inc., PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485, *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce in a year have been met.

transaction, conducting a business requiring a license under the Perishable Agricultural Commodities Act. It based its conclusion on records in respondent's files which showed that there were out-of-state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the produce. Respondent has suggested that the produce was bought by City Wide Distributors of Arkansas. However, it acknowledged in its brief that at least for a short period of time it had agreed to pay invoices on behalf of the Arkansas Corporation. This acknowledgment in its brief is inconsistent with respondent's claim in paragraph 8 of its Answering Statement that "At no time did I, personally or as an officer of the Respondent Corporation, guarantee the payment of invoices for produce ordered by the Arkansas Corporation." Corry Brokerage, of course, issued broker's memoranda which showed that respondent was the purchaser. The above facts do not prove that respondent actually purchased and received the produce involved in this proceeding. However, they do show that there was a course of conduct on the part of respondent on which both the broker and complainant relied, under which respondent undertook to make payment on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. As an ostensibly neutral third party in this proceeding, the word of the broker, as manifested by its memoranda, is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T.J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing broker's memoranda which show respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. We find nothing in this record which might give credibility to respondent's claim that Corry Brokerage and Mr. Laite were in collusion with each other to mislead sellers of produce. Therefore, based on the facts discussed above, we have no alternative other than to find the respondent was involved with respect to the transactions involved in this proceeding.

Having found that respondent was involved in the transactions we must determine whether it is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transactions herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least did not repudiate that relationship until July 20, 1983, when Leslie S. Hauger, Jr., its attorney, sent a letter to the Department of Agriculture, which was almost two months after the last transaction occurred. Furthermore, respondent held itself out as the buyer to complainant, and did not repudiate that understanding until it filed its answer on January 31, 1984. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its action, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Park Hill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1957). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complaint relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that the produce was never delivered to it, we find based upon a preponderance of the evidence that respondent either actually received the goods or received constructive delivery of them. Corry Brokerage issued broker's memoranda of sale showing that respondent was the purchaser. Complainant also issued invoices showing that respondent was the purchaser, and complainant provided bills of lading signed by the truck driver which showed that respondent was the purchaser. It is our conclusion that the evidence is sufficient to show that respondent did purchase the goods.³

³ Respondent attached a copy of the complaint in *Don Whitfield d/b/a Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 6513, in an effort to support its claim it did not purchase the goods. We are not impressed by its contents. Complainant can hardly

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We are particularly impressed with the fact that the invoices and broker's memoranda were sent to respondent approximately at the time the transactions occurred.⁴ Presumably, respondent received copies of the invoices and the broker's memoranda of sale. At least it never denied it did. If respondent were truly not involved in these transactions, it should have notified both those parties immediately upon receipt of the documents that it did not receive or accept the produce. Otherwise, its failure to do so was misleading to both. Rather than do this respondent did not take any specific action to deny the existence of these contracts until January 31, 1984. This was seven months after the last transaction occurred. This is simply too late for respondent to deny its involvement with respect to the transactions. Immediate action would have permitted complainant and Corry Brokerage to avoid further sales, and secondly to try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent has not paid complainant \$3,471.05 with respect to the nine transactions discussed above. Based upon our discussion, above, we find the respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$982.35 with interest thereon at the rate of 13% per annum from May 1, 1983, until paid. Also, within 30 days from the date of this Order respondent shall pay to complainant, as reparation, \$2,133.95 with interest thereon at the rate of 13% per annum from June 1, 1983 until paid. Finally, within 30 days from the date of this Order respondent shall pay to complainant, as reparation, \$354.75, with interest thereon at the rate of 13% per annum from July 1, 1983, until paid.

be bound by a complaint in another case, particularly when that case has not been decided.

BORELLI PRODUCE DISTRIBUTORS v. CITY WIDE DISTRIBUTORS, INC.
PACA Docket No. 2-6488. Decided February 25, 1985.

Failure to pay—Jurisdiction—License—Apparent agency—Constructive delivery—
Reparation awarded.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$638.50 in connection with the sale of a partial truckload of mixed vegetables in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement. Respondent filed an answering statement. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Borelli Produce Distributors, is a corporation with an address at P.O. Box 5187, Fresno, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Blvd., Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At one point Mr. Barnes agreed with Mr. Laite that respondent would advance money to City Wide Distributors of Arkansas for the purchase of produce since the latter corporation lacked operating capital. Respondent admitted that immediately prior to the time of the trans-

action involved herein, and possibly when it occurred, that "upon receipt of produce allegedly purchased by the Arkansas Corporation, the undersigned requested the respondent Corporation to pay such invoices, and to then invoice the Arkansas Corporation for the sums advanced. When the Arkansas Corporation failed to reimburse the respondent Corporation, this practice was terminated." However, respondent did not make any statement in the record as to when or how the practice of making such payments was terminated.

4. During the time of the transaction involved in this proceeding respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On May 4, 1983, complainant sold to respondent in interstate commerce 65 cartons of mixed vegetables at various prices, plus precooling and palletization, for a total contract price of \$638.50. Corry Brokerage of Memphis, Tennessee was the broker. It issued a broker's memorandum which showed that the respondent was the purchaser. Complainant issued an invoice which showed that the goods were sold to respondent. A bill of lading which was issued by complainant showed that the goods were destined for delivery to respondent in Tulsa, Oklahoma. Respondent did not notify complainant that it claimed it was not the purchaser until July 7, 1983.

6. A formal complaint was filed in this proceeding on December 19, 1983, which was within nine months of the time of the cause of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant con-

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Denns Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillie Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.* PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull*

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tends that dealing through Corry Brokerage it sold to respondent mixed vegetables which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$638.50. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period of the transaction respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of goods purchased in the 18 proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased produce totaling at least 2,000 pounds during the period April through June, 1983. In addition, the quantity of goods purchased in those 18 proceedings is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of

Produce v. City Wide Distributors, Inc., PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce in a year have been met.

respondent's records, that respondent was, during the time of this transaction, conducting a business requiring a license under the Perishable Agricultural Commodities Act. It based its conclusion on records in respondent's files which showed that there were out-of-state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the produce. Respondent has suggested that the produce was bought by City Wide Distributors of Arkansas. However, it acknowledged in its brief that at least for a short period of time it had agreed to pay invoices on behalf of the Arkansas Corporation. This acknowledgment in its brief is inconsistent with respondent's claim in paragraph 8 of its Answering Statement that "At no time did I, personally or as an officer of the Respondent Corporation, guarantee the payment of invoices for produce ordered by the Arkansas Corporation." Corry Brokerage, of course, issued a broker's memorandum which showed that respondent was the purchaser. The above facts do not prove that respondent actually purchased and received the produce involved in this proceeding. However, they do show that there was a course of conduct on the part of the respondent on which both the broker and complainant relied, under which respondent undertook to make payment on behalf of City Wide Distributors of Arkansas even if it did not purchase and receive the goods itself. As an ostensibly neutral third party in this proceeding, the word of the broker, as manifested by its memorandum, is entitled to great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T. J. Power & Co.*, 40 Agric. Dec. 425 (1981). Corry Brokerage, by issuing a broker's memorandum which shows respondent as the purchaser, clearly manifested its understanding that respondent was the purchaser and receiver of the produce. We find nothing in this record which might give credibility to respondent's claim that Corry Brokerage and Mr. Laite were in collusion with each other to mislead sellers of produce. Therefore, based on the facts discussed above, we have no alternative other than to find the re-

spondent was involved with respect to the transaction involved in this proceeding.

Having found that respondent was involved in the transaction we must determine whether it is liable. When a party subject to license under the Act, or alternatively which is licensed under the Act, holds itself out as a party willing to make payment for goods, whatever its reason, it is liable to make payment for such goods. Therefore, the defense raised by respondent that Corry Brokerage was not its agent when the transaction herein occurred must fail because by its course of conduct respondent at one point utilized Corry Brokerage as its agent, and at the very least did not repudiate that relationship until almost two months after the transaction occurred. Furthermore, respondent held itself out as the buyer to complainant, and did not repudiate that understanding until it filed its answer on December 15, 1983. Therefore, whether there was a contract between complainant and respondent is immaterial. Respondent, by its action, created at least an apparent agency in Corry Brokerage, and acted as if it were the principal. Therefore, complainant was entitled to look to it for reimbursement. *The G. Fava Co. v. Park Hill Produce Company and/or Frank Fernandez*, 19 Agric. Dec. 928 (1960). It is well settled that a principal is bound by the acts of an agent which acts within the scope of its authority. *Robert Johnson v. Carl Fritchey and Lou Loden*, 16 Agric. Dec. 1082 (1967). Furthermore, respondent is estopped to deny such agency because it knowingly permitted Corry Brokerage to appear as its agent, complainant relied on such representation in good faith, and was injured as a result. *A. Levy & J. Zentner Company v. American National Growers Corp.*, 19 Agric. Dec. 1022 (1960); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (1955).

With respect to respondent's claim that the produce was never delivered to it, we find based upon a preponderance of the evidence that respondent either actually received the goods or received constructive delivery of them. Corry Brokerage issued a broker's memorandum of sale showing that respondent was the purchaser. Complainant also issued an invoice showing that respondent was the purchaser, and complainant provided a bill of lading which showed that respondent was the purchaser. It is our conclusion that the evidence is sufficient to show that respondent did purchase the goods.³

³ Respondent attached a copy of the complaint in *Don Whitfield d/b/a Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513 in an effort to support its claim that it did not purchase the goods. We are not impressed by its contents. Complainant can

We are particularly impressed with the fact that the invoice and broker's memorandum were sent to respondent approximately at the time the transactions occurred. Presumably, respondent received copies of the invoices and the broker's memorandum of sale. At least it never denied it did. If respondent were truly not involved in the transaction, it should have notified both those parties immediately upon receipt of the documents that it did not receive or accept the produce. Otherwise, its failure to do so was misleading to both. Rather than do this respondent did not take any action to deny the existence of this contract until July 7, 1983, when its Attorney, Leslie S. Hauger, Jr., sent a notice that respondent would not pay the claim. This was two months after the transaction occurred. This is simply too late for respondent to deny its involvement with respect to the transaction. Immediate action would have permitted complainant and Corry Brokerage try to trace the goods so as to ascertain what actually did happen. The conduct of respondent shows rather clearly that it did purchase and receive the goods.

Respondent has not paid complainant \$638.50 with respect to the transaction discussed above. Based upon our discussion, above, we find the respondent owes complainant that sum. Its failure to pay this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within thirty days from the date of this Order respondent shall pay to complainant, as reparation, \$638.50 with interest thereon at the rate of 13% per annum from June 1, 1983, until paid.

hardly be bound by a complaint in another case, particularly when that case has not been decided.

LOUIS BOURGOINE, JR., v. INTERSTATE FOOD PROCESSING CORP. PACA
Docket No. 2-6561. Decided February 25, 1985.

Breach of contract—Unreasonable delay in harvesting—Dismissed.

Andrew Y. Stanton, Presiding Officer.

Dorothy Kelley, Presque Isle, Maine, for complainant

Donald E. Quigley, Presque Isle, Maine, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,805.70 in connection with the sale of a quantity of peas intended for shipment in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be a part of the evidence, as are the verified complaint and answer. The parties were also given an opportunity to submit additional evidence in the form of verified statements as well as to file briefs. Complainant elected not to submit any additional evidence. Respondent submitted a deposition as its answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Louis Bourgoine, Jr., is an individual whose address is RFD #1, Box 157, Limestone, Maine.

2. Respondent, Interstate Food Processing Corporation, is a corporation whose address is P.O. Box 172, Fort Fairfield, Maine. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On April 20, 1983, complainant entered into a written contract with respondent to plant, cultivate, and sell to respondent approximately 40 acres of peas to be harvested from complainant's four fields. Respondent would advance complainant money for seed, complainant would plant and maintain the crop, and respondent would harvest the peas. Complainant would have to pay to respondent the money advanced for seed, a harvesting fee, and a

loading fee. Complainant would also have to pay an "ABC" charge for the benefit of a grower's organization. The price that respondent would pay for the peas would depend on the weight of the peas and their tenderness, as determined by a machine called a tenderometer. According to the contract, the lowest rate at which complainant would be paid would be \$172.00 per ton, if the tenderometer reading exceeded 115. The contract also contained a provision which authorized respondent to refuse to harvest any fields not reasonably free from weeds. In such a case, complainant would still be responsible for the cost of seed. Another provision of the contract permitted respondent to by-pass a field if it had too great a supply of peas already on hand, or in order to maintain certain quality standards. If the option to by-pass was undertaken, respondent would be obligated to pay complainant \$100.00 per acre, and complainant would not be liable for the cost of seed. At the time of contracting, the parties expected the peas ultimately to be shipped in interstate commerce.

4. Complainant was advanced money from respondent for purchasing seed. Respondent eventually planted 38.9 acres in four fields; one containing 11.5 acres (hereinafter, field "A"), one 10.9 acres (hereinafter, field "B"), one 6.5 acres (hereinafter, field "C"), and one 10.0 acres (hereinafter, field "D"). The crop was due to be harvested in late August 1983.

5. During the summer of 1983, respondent's field manager, Donald Goughan, became aware that complainant's fields had an abundance of weeds. After personally observing complainant's fields in August of 1983, Goughan decided that fields A and B would have to be rejected because of excessive weeds, but hoped that two acres from field B eventually could be harvested. On approximately, August 24, 1983, Goughan sent notices to complainant stating respondent's decision to reject fields A and B. At that time, Goughan also had discussion with complainant about the situation.

6. On September 4, 1983, respondent harvested fields C and D and 6.5 acres of field A, for a total of 23 acres. Respondent attempted to harvest two acres from field B but wasn't able to do so because the fields were too wet. Complainant's fields were among the last to be harvested of the fields in complainant's area.

7. The 6.5 harvested acres of field A resulted in 9.077 tons of peas, which had tenderometer readings of 236 and 238. The 10.9 acres of field B were not harvested. The 6.5 acres of field C, all of which were harvested, resulted in 11.164 tons of peas, with tenderometer readings of 231 and 247. The 10 acres of field D, all of which were harvested, resulted in 13.8556 tons of peas, with tenderometer readings of 238 and 242. Respondent prepared notices re-

flecting the weight of the peas harvested for each field and the tenderometer readings of such peas on September 4, 1983, and sent them to complainant. Respondent also sent an accounting sheet to complainant. It showed that for field A, the 9.077 harvested tons were paid at the rate of \$172.00 per ton, or \$1,561.24. Deducted from this amount were a harvest charge of \$191.75, a tonnage charge of \$854.10, a seed charge of \$639.93, and an ABC charge of \$6.50, for a net loss of \$134.50. Payment for the 11.64 tons harvested from field C was made at the rate of \$172.00 per ton, totaling \$1,920.21. Deducted from this sum were a harvest charge of \$191.75, a tonnage charge of \$787.06, a seed charge of \$396.90, and an ABC charge of \$6.50, for a net of \$538.00. The 13.8556 tons harvested from field D were paid at the rate of \$172.00 per ton, for a total of \$2,383.15. Deducted from this sum were a harvest charge of \$285.00, a tonnage charge of \$976.81, a seed charge for both fields D and B totaling \$1,314.00, and an ABC charge of \$10.00, for a net loss of \$212.66. In accordance with these figures, the net amount owed to complainant for the four fields was \$194.30.

8. On September 16, 1983, respondent sent complainant a check for \$194.30, which complainant accepted as partial payment.

9. A formal complaint was filed February 15, 1984, which was within nine months from when the alleged cause of action herein accrued.

CONCLUSIONS

This case involves a written contract entered into between the parties on April 20, 1983, under which complainant agreed to plant peas on four fields totaling approximately 40 acres. Respondent would harvest the peas and pay complainant a rate determined by the tonnage harvested and the tenderness of the peas, as revealed by a machine called a tenderometer. The contract provided, among other things, that respondent could either accept the peas, reject them, or by-pass the field. If respondent chose the latter option, it would be liable to complainant for \$100.00 per acre by-passed. Complainant claims that respondent, in effect, by-passed its four fields, since it unreasonably delayed for three weeks before attempting to harvest them. Complainant claims that respondent, therefore, is liable for \$100.00 per acre for each of the 40 acres, or \$4,000.00, less the \$194.30 already paid, or \$3,805.70. Respondent denies liability.

Many of the facts herein are undisputed. Although complainant's damages are based on the assumption that he planted 40 acres of peas, complainant states in his complaint that he planted only 38.9 acres; 11.5 in field A, 10.9 in field B, 6.5 in field C, and 10.0 in field D. Complainant does not dispute respondent's contention that it re-

jected field A on August 24, 1983, although later accepted 6.5 acres of field A on September 4, 1983, rejected field B on August 24, 1983, and accepted fields C and D on September 4, 1983. Neither does complainant dispute the accuracy of respondent's figures as set forth in its accounting (see Finding of Fact 7). However, it is complainant's position that respondent unreasonably delayed harvesting for three weeks until the peas had aged to the point where they were no longer in a condition to bring a high rate of return in accordance with the terms of the written contract. This allegedly led to respondent either rejecting them or paying for them at the lowest possible rate of \$172.00 per ton. Complainant claims that respondent's delay was, in effect, a decision to by-pass the fields. As the moving party herein, it is complainant's burden to prove the contract terms, respondent's breach thereof, and the resulting damages, by a preponderance of the evidence. *New York Produce Trade Association, Inc. v. Sidney Sandler*, 32 Agric. Dec. 702 (1973).

The essential question is whether respondent was in breach of contract by accepting or rejecting complainant's fields when it did. The April 1983 written contract contains no provisions stating when the peas should be harvested. Respondent has submitted into evidence as its answering statement the deposition of its harvesting manager, Donald Goughan. He stated (at p. 8) that the harvesting usually begins about July 15 and extends into the first week of September. Goughan stated that complainant's fields were originally scheduled to be harvested in the latter part of August because they were planted late (at p. 22). According to Goughan, the problems associated with complainant's fields came about because they were infested with weeds. He said that he first discussed this with complainant about the second week of August (at pp. 22-23). Goughan stated that the weeds contributed to the high tenderometer readings because they tend to take moisture out of the ground (at p. 24). Goughan asserted that the presence of the weeds brought on respondent's decision not to harvest complainant's fields until September 4, 1983, as respondent feared that the weeds might damage its harvesting machines, and thus preferred to harvest other fields prior to complainant's (at p. 35). Complainant was given an opportunity to respond to Goughan's testimony but did not make any attempt to do so. Therefore, we must give Goughan's testimony at least equal weight to that of complainant's allegations. Based largely on Goughan's testimony, we conclude that respondent's actions with respect to complainant's four fields were in conformance with the terms of the contract, and that complainant has thus failed to sustain its burden of proving that such actions, in effect, constituted a by-pass of complainant's fields.

Complainant does not dispute the validity of any of respondent's figures set forth in its accounting (Finding of Fact 7). Therefore, respondent's remittance of \$194.30 is all to which complainant is legally entitled. Accordingly, the complaint is without merit and must be dismissed.

ORDER

The complaint is hereby dismissed.

GULF LAKE PRODUCE CO. v. STANLEY & JOE RUSSO. PACA Docket No. 2-6583. Decided February 25, 1985.

Acceptance—Breach of contract, burden of proof—Determination of damages—
Change in contract terms.

When respondent accepts shipment of commodity, burden of proof of breach and damages falls on respondent. Respondent failed to meet its burden and therefore is held liable for the full contract price because it did not show that contract terms changed. Damages as determinable on basis of lowest known market price.

Andrew Y. Stanton, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$26,858.15 in connection with numerous shipments of produce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Although the amount claimed as damages exceeds \$15,000.00, the parties waived oral hearing. Therefore, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as is the verified complaint. The answer, since it is not verified, is not considered part of the evidence. The parties were given the opportunity to submit ad-

ditional evidence in the form of verified statements and to file briefs, but elected not to do so.

FINDINGS OF FACT

1. Complainant, Gulf Lake Produce Co., is a partnership whose address is P.O. Box 697, Belle Glade, Florida.

2. Respondent, Stanley & Joe Russo, is a partnership whose address is 1168 E. 37th St., Brooklyn, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. From December 8 through December 22, 1983, complainant sold to respondent 10 truckloads of produce, as follows: On December 8, 1983, a truckload of tomatoes for \$9,216.00; on December 9, a truckload of cherry tomatoes and peppers for \$10,251.85; on December 9, a truckload of grapefruit for \$3,990.00; on December 9, a truckload of mixed vegetables for \$8,897.00; on December 16, a truckload of grapefruit for \$5,220.00; on December 16, a truckload of grapefruit for \$4,820.00; on December 16, a truckload of peppers for \$3,362.55; on December 16, a truckload of grapefruit for \$6,000.00; on December 17, a truckload of grapefruit for \$4,350.00; and on December 22, a truckload of okra with an open price.

4. The produce was shipped in interstate commerce to respondent, which received and accepted it. Respondent has, to date, paid complainant \$30,989.25 for the 10 loads.

5. A formal complaint was filed on April 25, 1984, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

The complaint is for \$26,858.15, which constitutes the difference between the alleged contract prices of the 10 loads of produce, or \$57,847.40, and the \$30,989.25 which the parties agree is all that respondent has paid. In its opening statement, complainant attempts to amend its complaint by alleging that respondent's indebtedness is currently \$34,254.95, but has offered no explanation for this increase nor any supporting evidence. Therefore, the attempted amendment of the complaint will not be given any consideration herein.

Respondent, in its unsworn answer, the only documentation it chose to submit, admits purchasing, receiving, and accepting the produce as alleged in the complaint. Therefore, respondent is liable for the agreed upon contract price, less damages due to any breach of warranty by complainant. It is respondent's burden to prove the breach and damages by a preponderance of the evidence. *Santa Clara Produce, Inc. v. Caruso Products Inc.*, 41 Agric. Dec. 2279

(1982), Respondent alleges that the agreed upon contract prices were changed after the produce arrived, resulting from discussions between the parties concerning the presence of condition problems. This is denied by complainant. It is respondent's burden to prove any change in the contract terms (*American Banana Co., Inc. v. Marvin Gray*, 41 Agric. Dec. 539 (1982)), but respondent has not provided any evidence to support the alleged changes. Therefore, we find that respondent has failed to sustain its burden of proof with respect to this issue.

Respondent has also failed to sustain its burden of proving a breach of warranty due to the alleged condition problems of the produce purchased from complainant, as respondent has not provided any evidence of these problems, such as an inspection report. Therefore, respondent is liable for the original contract prices for all ten loads. For the nine truckloads given definite prices, respondent is liable for \$9,216.00, \$10,251.85, \$3,990.00, \$8,897.00, \$5,220.00, \$4,820.00, \$3,362.55, \$6,000.00 and \$4,350.00, totaling \$56,107.40. For the truckload of okra, consisting of 348 cartons, which was to be sold at an open price, respondent is liable for the lowest market price revealed by the Market News Service Reports at the place and date of acceptance, New York City on December 23, 1983. *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981). As there are no listings for that date, we will use the listings for the next date on which Reports were published, December 27, 1983, which show a market price of \$9.00 per carton. However, complainant has claimed only \$5.00 per carton, and it is our practice not to award damages exceeding the amount claimed. Therefore, respondent is liable for the 348 cartons of okra at \$5.00 per carton, or \$1,740.00. Respondent was thus liable to complainant for a total of \$56,107.00 plus \$1,740.00, or \$57,847.40. As respondent has paid complainant \$30,989.25, respondent remains liable for \$26,858.15, and its failure to pay complainant this sum is a violation of Section 2 of the Act.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$26,858.15, with interest thereon at the rate of 13% per annum from February 1, 1984, until paid.

BELRIDGE PACKING CO. v. FIRST QUALITY FRUIT & PRODUCE CO., INC.
and/or C.H. ROBINSON COMPANY. PACA Docket No. 2-6451. De-
cided February 27, 1985.

Acceptance—Breach of contract, burden of proof—Suitable shipping conditions—
Damages.

Where respondent accepted goods and was able to demonstrate that the complain-
ant did not deliver the goods in suitable shipping condition, respondent was not
liable to complainant for the full contract price, but only the value of the goods ac-
cepted.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondent First Quality Fruit & Produce Co., Inc., *pro se*.

Owen Gleason, Eden Prairie, Minnesota, for respondent C.H. Robinson Company.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondents in the amount of \$14,999.99 in connection with the sale of one truckload of plums in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon each of the respondents. Respondent C.H. Robinson Company filed an answer to the complaint denying any liability thereunder. Respondent First Quality Fruit & Produce Co., Inc., defaulted in the filing of an answer and was notified on January 23, 1984, that it was considered to be in default. On February 2, 1984, this respondent filed a motion to reopen after default which was served upon complainant. On February 22, 1984, complainant filed a motion to deny the reopening of the proceeding. On March 7, 1984, an order was issued reopening after default, and giving respondent First Quality Fruit & Produce Co., Inc., time in which to file an answer. On March 19, 1984, this respondent filed an answer denying liability to complainant.

The amount claimed as damages in the formal complaint does not exceed \$15,000, and accordingly the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence herein as is the Department's Report of Investigation. In addition the parties were given the opportunity to file evidence in the form of sworn

statements. Complainant filed an Opening Statement, both respondents filed an Answering Statement, and complainant filed a Statement in Reply. Complainant and respondent C.H. Robinson Company filed briefs.

FINDINGS OF FACT

1. Complainant, Belridge Packing Co., is a corporation whose address is P.O. Box 1852, Bakersfield, California.

2. Respondent, First Quality Fruit & Produce Co., Inc., is a corporation whose address is 3130 Produce Row, Houston, Texas. At the time of the transaction involved herein this respondent was licensed under the Act.

3. Respondent, C.H. Robinson Company, is a corporation whose address is 10690 Shadow Wood, Suite 110, Houston, Texas. At the time of the transaction involved herein this respondent was licensed under the Act.

4. On or about June 9, 1982, complaint sold to respondent First Quality, one truckload of plums as follows: 1,440 cartons, U.S. No. 1 Red Beaut, size 4 × 5, at \$10.00 per carton, plus \$.60 per carton for precooling and palletizing, and \$22.50 for a temperature recorder, or a total price of \$15,286.50 f.o.b. The sale was negotiated through respondent, C. H. Robinson Company, acting as broker.

5. Loading of the truck at complainant's place of business in Lerdo, California was completed at 3:45 p.m. on June 9, 1982. Temperature range was specified on the bill of lading to be 34 to 36°, and a "Therma Guard" recording instrument, number 109754, was placed on the truck. Such instrument contained chart number 52693. The plums were shipped on June 9, 1982, and arrived at the place of business of respondent First Quality in Houston, Texas at approximately 8:00 a.m. on June 11, 1982. Respondent, First Quality, noted damage in the plums, and notified respondent C. H. Robinson Company, which in turn notified complainant. Respondent First Quality also called for a federal inspection.

6. The plums were federally inspected at respondent First Quality place of business in Houston, Texas, at 10:45 a.m. on June 11, 1982, and an inspection certificate was issued which stated in relevant part as follows:

Products Inspected:

Plums in cartons printed "Belridge California Fruit, Belridge Packing Co., Bakersfield, Cal." and stamped "Red Beaut Plums, Net. Wt. 28 Lbs., 4 × 5 size" Applicant states: 1,500 cartons.

Condition of Load:	Stacked in cold room at above location.
Condition of Pack.	Jumble, well filed.
Temperature of Product:	Various cartons in various locations 40 to 42°F.
Condition:	In all cartons some to most stock watery and translucent in appearance most of which are soft or flabby characteristic of low temperature exposure and so located as to indicate occurred after packing but not in present location.

7. "Therma-Gard" chart No. 52693, with date: 6-9-82, time: 1:45 p.m., was submitted in evidence and showed the following: Trace begins at 0 hour showing 40° and gradually declines to 35° at 12 hours where it continues steady until the 30th hour. At the 30th hour the trace rises vertically to about 52° where it ends. The temperature recorder was subsequently submitted to Therma Guard for calibration. Such calibration showed that at 29° and 37° the recorder was reading 3° lower than actual temperature.

8. An informal complaint was filed on March 7, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The record in this proceeding shows that respondent First Quality accepted the plums by unloading them from the truck and placing them in its warehouse. This respondent, therefore, became liable to complainant for the full purchase price of the plums less any damages resulting from any breach of contract proven by respondent. *Ice Produce v. Mickelian Sales*, 29 Agric. Dec. 150 (1970). The federal inspection at destination, made some three hours after the arrival of the plums, clearly shows that such plums were abnormally deteriorated on arrival. Complainant, however, maintains that the damage in the plums, which was stated to be "characteristic of low temperature exposure", must have occurred during transit, and consequently must be the responsibility of respondent under the f.o.b. terms of the sale. Complainant points to the fact that the temperature tape covering the shipment the period of time between completion of loading in California and arrival of the truck in Houston, Texas was 38 hours. Although the temperatures over the 30 hour period shown by the tape were approximately 38°, and thus not in any way indicative of the below freezing conditions

which would be necessary to cause the damage disclosed by the federal inspection, complainant apparently would have us believe that freezing must have taken place during the 8 hour period not disclosed on the tape. The temperature of the plums, as disclosed by the federal inspection (40° to 42°F.) less than 3 hours after arrival of the truck, would appear to us to diminish the probability of any freezing having taken place toward the end of the transit period. On the other hand the beginning of the tape shows the temperature dropping from approximately 40°F to the range of 35°, and would similarly seem to negate freezing having taken place at the beginning of the transit period.

While these speculations are not conclusive as to the issue, there is a more certain indication in the record that freezing did not take place during transit. The federal inspection states that the watery and translucent appearance affected some to most stock in *all* cartons. It seems unlikely to us that during an 8 hour period freezing air could have been adequately circulated within a heavily loaded truck so as to cause all cartons to have some to most stock affected by freezing.

Complainant submitted temperature charts covering the two cooling rooms from which it alleged the plums were drawn prior to shipment. These charts cover the two days preceding shipment of the plums, and generally show temperatures between 33 and 43°. However, on both of the June 9 charts there is a gap in the trace covering about a 3 hour period. More importantly there was no showing by complainant that the subject plums were in the coolers for only the two days covered by the charts. Therefore, we cannot give this evidence much weight. It is our conclusion that the damage to the plums did not occur during transit, and that consequently such plums were not in suitable shipping condition when loaded on to the truck. See 7 CFR § 46.43(j).

Where the receiver has accepted the goods, the measure of damages is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. UCC Section 2-714; *Half Moon Fruit & Produce Company v. V.F. Lanasa, Inc.*, 39 Agric. Dec. 1520 (1980). In this case respondent First Quality reconditioned the plums, and resold them promptly and in a proper manner. The gross proceeds from the resale of the plums amounted to \$12,700.00. In the absence of market reports showing the value of conforming plums we will use the f.o.b. contract price for the subject plums, plus freight. See *Corte & Sons v. Lerner & Son*, 14 Agric. Dec. 320 (1955). The f.o.b. contract price of the plums was \$15,286.50. The freight applicable to the load was \$2,304.00. The

value of the plums if they had been as warranted was accordingly \$17,590.50. This amount less the gross proceeds of \$12,700.00, leaves \$4,890.50 as respondent First Quality basic damages herein. In addition, respondent is entitled to the 15% handling charge claimed on its accounting, or \$1,905.00, and the reconditioning charge of \$.50 per carton, or \$720; for a total amount, when added to this respondent's basic damages, of \$7,515.50. Deduction of this amount from the purchase price leaves a net amount still due and owing to complainant from respondent First Quality of \$7,771.00. Since respondent First Quality tendered this exact amount to complainant on March 24, 1983, and such amount was refused, we will award interest on this amount only between July 1, 1982, and March 24, 1983.

Complainant brought this action against respondent C.H. Robinson Company with the following express condition as stated in its formal complaint in paragraph 7a:

That in the alternative if it is held that respondent First Quality Fruit & Produce Co., Inc., is not held liable for the agreed purchase price, that respondent C.H. Robinson Company be held liable for failing to perform the duties of a broker in negotiating a valid and binding contract.

There is absolutely no indication in the record that respondent C.H. Robinson Company failed to negotiate a valid and binding contract. Accordingly the complaint as against respondent C.H. Robinson Company should be dismissed.

ORDER

Within 30 days from the date of this Order, respondent First Quality Fruit & Produce Co., Inc., shall pay to complainant, as reparation, \$7,771.00, with interest thereon at the rate of 13 percent per annum from July 1, 1982, through March 24, 1983.

The complaint against respondent C.H. Robinson Company is dismissed.

STEVCO, INC. v. MICHAEL BROS., INC. PACA Docket No. 2-6534. Decided February 27, 1985.

Consignment—Burden of proof—Dismissed.

Edward M. Silverstein, Presiding Officer

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation from respondent in the amount of \$1,822.59 in connection with one transaction, in interstate commerce, involving grapes, a perishable agricultural commodity.

Both parties were served with a copy of the Department's report of investigation. Respondent also was served with a copy of the formal complaint. Although, it at first failed to file a timely answer, subsequent to the granting of its Motion to Reopen After Default by Order dated April 17, 1984, respondent did file an answer denying any further liability to complainant.

Since the amount claimed as damages did not exceed \$15,000, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered to be a part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements. Complainant file a verified opening statement, and respondent filed a verified answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Stevco, Inc., is a corporation whose mailing address is P.O. Box 6157, Beverly Hills, California 90212.

2. Respondent, Michael Bros., Inc., is a corporation whose mailing address is Produce Building, 38 Harris Avenue, Providence, Rhode Island 02903. At all material times, respondent was licensed under the Act.

3. On or about December 15, 1982, in the course of interstate commerce, complainant shipped a load of grapes containing 1,080 lugs to its customer, Hannaford Bros., in Portland, Maine, by V.T.X truck. The price of the grapes was \$6.00 per lug (\$6,480), plus \$22.50 for a Ryan Recorder, and 70 cents per lug for palletiza-

tion and cooling (\$750.00), for a total f.o.b. price of \$7,258.50. Hannaford Bros. rejected the load, and the grapes were loaded on a Hutchins Transportation truck for shipment to DiMare Bros., in Everett, Massachusetts. On December 21, 1982, DiMare Bros. refused to handle the grapes for complainant's account. After this refusal, the respondent was contacted by C.H. Robinson Company, Everett, Massachusetts, and asked if it could handle a load of "troubled grapes." As respondent had a half loaded trailer at the New England Produce Center in Chelsea, Massachusetts, at the time, C.H. Robinson was informed that it could load the grapes on board the trailer and that subsequent to an inspection upon arrival in Providence, Rhode Island, respondent would discuss the matter with C.H. Robinson Company. On December 22, 1982, C.H. Robinson Company issued a confirmation of sale indicating that the transaction was on a Deferred Billing basis. This confirmation was sent to both parties. Upon arrival of the grapes at respondent's place of business, on December 22, 1983, Isaac Michael contact Steve Goldberg of C.H. Robinson Company, and negotiated a price of \$3.00 per box delivered. C.H. Robinson Company issued a corrected confirmation of sale indicating that the respondent has purchased the grapes from complainant at a price of \$3.00 delivered. This corrected confirmation, which was also dated December 22, 1983, was sent to both parties.

4. Respondent has paid complainant \$3,240.00 with respect to this shipment. This represents a price of \$3.00 per lug for 1,080 lugs.

5. A formal complaint was filed on September 6, 1983, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The dispositive issue in this case is whether or not the grapes were consigned to respondent, or sold to it for a price of \$3.00 per lug delivered.¹ There is absolutely no evidence that the respondent accepted this load of grapes on consignment. The only evidence in the case which has any probative value is the broker's two confirmations of sale. On the first, it was noted that the sale was on Deferred Billing basis; on the corrected confirmation, it is indicated that the produce was sold to respondent at a price of \$3.00 delivered. The only evidence offered by the complainant in support

¹ We feel it incumbent on us to note that the allegation in the complaint that the complainant consigned this load of grapes to the respondent on December 15, 1982, and that it was shipped on that date to the respondent, is totally false. The truth, as noted above, is that this load was twice rejected by other parties before the respondent was ever contacted by the broker with regard to it.

its allegation that this was a consignment sale is its bare assertion that it never agreed to a sale on the basis of a \$3.00 delivered price.² However, in the light of the fact that these grapes were twice rejected,³ a fact which complainant failed to plead in its complaint, the assertions of the respondent, and the confirmations issued by the broker, we cannot hold that the complainant has satisfied its burden of proving, by a preponderance of the evidence, that this was a consignment sale.⁴ *Hol-Mex Corp. v. DiMare Bros.*, 19 Agric. Dec. 1187 (1960). Rather, the preponderance of the evidence indicates that the sale term was \$3.00 per lug delivered, or a total of \$3,240.00. Since the respondent has paid the complainant for the grapes in accordance with the parties' contract, it is not further obligated to complainant. Thus, the complaint must be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

PAPPAS & CO. v. RALPH & CONO COMMUNALE PRODUCE CORP. PACA
Docket No. 2-6504. Decided February 28, 1985.

Breach of warranty—Suitable shipping condition—Failure to pay—Reparation
awarded.

Andrew Y. Stanton, Presiding Officer

Complainant, *pro se*.

Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation

² It should be noted that the record does not contain a statement from Mr. Goldberg, C.H. Robinson Company, as to the events which lead to the issuance of the corrected confirmation.

³ Although never made a clear issue by either party, and although there is no evidence in the record as to it, we seriously question whether the condition of the grapes warranted the complainant's bringing of this action

⁴ That the Department's investigator attempted to create an accounting from respondent's records is not proof that the sale was by consignment.

against respondent in the amount of \$2,100 in connection with a truckload of cantaloupes sold in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. The parties declined to submit any additional evidence. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Pappas & Co., is a corporation whose address is P.O. Box 477, Mendota, California.

2. Respondent, Ralph & Cono Communale Produce Corp., is a corporation whose address is 353 N.Y.C. Terminal Market, Bronx, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On July 22, 1983, complainant sold to respondent a truckload of no grade cantaloupes consisting of 1,050 cartons 1 size 18, at \$7.00 per carton, f.o.b., plus \$.80 per carton for pallets and cooling, \$.15 per carton for brokerage, and \$22.50 for a Ryan recorder, for a total contract price of \$8,370. There was no contract provision that complainant was to provide protection. The contract was negotiated through a broker, Salisch Produce Co., Inc., Fresno, California.

4. The broker issued a confirmation of sale on approximately July 22, 1983, reflecting the contract terms set forth in Finding of Fact 3, and sent it to both parties. The confirmation of sale did not indicate that the cantaloupes were to be of any particular grade, and made no mention of any grant of protection to be given to respondent.

5. On July 22, 1983, complainant shipped the cantaloupes to respondent, where they arrived on approximately July 27, 1983, and were accepted. Respondent secured a federal inspection which found as follows, in relevant part:

Quality:	Average 1% scars.
Condition:	Mostly ripe and firm, many firm. 1 to 3 melons in most cartons none in some average 10% soft ground color many light green, many turning, some yellow, 1 to 2 melons in half the cartons none in the remainder, average 4% damage by bruising. Average 1% decay.
Grade:	Meets quality requirements but fails to grade U.S. No. 1 only account of condition.
Remarks:	Inspection limited to initial 4 pallets being unloaded and in 2 pallets nearest rear door.

6. Neither complainant nor the broker gave respondent authorization to make any deductions from the contract price.

7. Respondent resold the cantaloupes from July 27, 1983, to August 1, 1983, and received \$10,783.00

8. On August 27, 1983, complainant received from respondent a check for \$6,270. Along with the check was complainant's invoice on which the price for the cantaloupes had been crossed out and the figure \$6,270 inserted. Beneath that was the notation "adjustment of \$2 per Bernie Salisch (copy of USDA attached)". Respondent's check was accepted by complainant as partial payment.

8. A formal complaint was filed on December 5, 1983, which was within nine months from when the cause of action herein accrued.

CONCLUSIONS

Respondent admits receiving and accepting the cantaloupes and, therefore, is liable for the contract price less damages due to any breach of warranty by complainant. Respondent bears the burden of proving the breach and damages by a preponderance of the evidence. *Pleasant Valley Vegetable Co-op v. Robt. T. Cochran & Co., Inc.*, 41 Agric. Dec. 1208 (1982). Respondent claims that the melons failed to grade U.S. Number one upon arrival, as indicated by a July 25, 1983, federal inspection, and asserts that the broker authorized respondent to deduct \$2 per carton. Respondent also asserts that the contract provided for respondent to be granted protection by complainant.

The July 25, 1983, federal inspection (Finding of Fact 5) shows substantial damage, especially an average of 10% soft. This is in

breach of complainant's warranty of suitable shipping condition (7 CFR § 46.43(j)). As damages resulting from the breach, respondent is entitled to the difference between the value of the melons if they had been as warranted, at the date and place of acceptance, and their actual value. The value of the melons as warranted is determined by reference to the applicable Market News Service Reports listing, and their actual value by the results of a prompt and proper resale. *Homestead Tomato Packing Co., Inc. v. Austin J. Merkel Co., Inc.*, 40 Agric. Dec. 1587 (1981). The July 27, 1983 Market News Service Reports for Bronx, New York show cantaloupes such as those involved herein with a price of \$10.00 to \$11.00 per carton, with a few at \$12.00 and some at \$9.00. The figure that most accurately represents the value of the cantaloupes as warranted is \$10.00 per carton. Therefore, the value of the entire 1,050 carton load should have been \$10,500. Respondent made a prompt and proper resale, which resulted in proceeds of \$10,783.00 (Finding of Fact 7). This exceeds the value of the melons as warranted. Therefore, respondent incurred no damages as a result of complainant's breach.

Respondent is liable for the contract price of \$8,370 less the \$6,270 which it has already paid, leaving \$2,100 due and owing. Respondent's failure to pay this sum to complainant is a violation of Section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$2,100, with interest thereon at the rate of 13% per annum from September 1, 1983, until paid.

CORRY BROKERAGE v. CITY WIDE DISTRIBUTORS, INC. PACA Docket No. 2-6578. Decided February 28, 1985.

Jurisdiction—License—Burden of proof—Dismissed.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A

timely complaint was filed in which complainant seeks an award in the amount of \$2,528.50 in connection with six transactions in interstate commerce involving shipments of partial truckloads of produce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant. Since the amount claimed as damages does not exceed \$15,000 the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence in the form of verified statements. Respondent filed an answering statement. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Arthur M. Zurhorst, is an individual doing business as Corry Brokerage, with an address at 2735 Brentwood Cove, Horn Lake, Mississippi.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Boulevard, Tulsa, Oklahoma. During the time in which the transactions in this proceeding occurred respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. During the time of the transactions involved in this proceeding respondent was involved in an agreement between itself and City Wide Distributors of Arkansas in which respondent assumed financial responsibility for any produce shipments shipped to Lowell, Arkansas. With respect to some transactions the produce was shipped first to Tulsa, Oklahoma. With respect to other transactions the produce was shipped to Lowell, Arkansas. Shipments were also made between the two companies from time to time.

4. During the months of April through June 1983 respondent purchased and sold fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On April 11, 1983 complainant issued a confirmation of order, which it called an invoice, for 85 cartons of mixed vegetables which showed respondent was the purchaser. The trucker issued a freight

bill which showed that the produce was to be delivered to City Wide Distributors of Arkansas in Lowell, Arkansas.

6. On April 28, 1983 complainant issued a confirmation of order for the sale of five sacks of potatoes which it called an invoice. It showed that City Wide Distributors of Arkansas in Lowell, Arkansas ordered the goods.

7. On May 7, 1983 complainant issued a confirmation of order which showed that respondent had ordered 50 cartons of lettuce.

8. On May 10, 1983 complainant issued a confirmation of order, which it called an invoice, which showed that respondent had purchased 125 cartons of lettuce and 10 cartons of peaches. On May 6, 1983 and May 8, 1983, the trucker issued freight bills which showed that the produce was delivered to City Wide Distributors of Arkansas in Lowell, Arkansas.

9. On May 19, 1983 complainant issued a confirmation of order which it called an invoice which showed that respondent had purchased 30 cartons of onions.

10. On June 9, 1983 complainant issued a confirmation of order which it called an invoice which showed that respondent had purchased 170 cartons of potatoes, 100 sacks of potatoes, and 50 cartons of apples.

11. A formal complaint was filed in this proceeding on September 6, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

This is one of eighteen similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F.olaus d/b/a D-Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillie Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold*

Continued

contends that it sold to respondent in 6 transactions transpiring between April 11, 1983, and June 9, 1983, partial truckloads of produce which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$2,528.50. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as agent for respondent, and therefore, could not bind it. Third, respondent says that it never received the invoices issued by complainant. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period April through June 1983 respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." Official notice is taken of the determination made in *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485, that respondent was involved in transactions where the total weight purchased in one day exceeded one ton. In addition, the quantity of goods purchased in the eighteen proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased more than \$230,000 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that for the period April through June 1983, respondent was "con-

Coast Packing, Inc v City Wide Distributors, Inc., PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borrelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a Whitfield Brokerage Company v. City Wide Distributors, Inc and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce a year have been met.

ducting a business requiring a license under the Perishable Agricultural Commodities Act." It based its conclusion on records in respondent's files which showed that there were many out of state sellers' invoices, and that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based upon the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the produce. As the party claiming that respondent purchased and received the produce, complainant has the burden of proof to show that such was the case. *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973). Based on this record we find that complainant has failed to sustain its burden of proof. While it submitted confirmations of sale, which it called invoices, the documents did not even bear the same dates as the dates on which complainant alleged the transactions occurred. In view of respondent's strong insistence it did not purchase the goods, these documents are virtually without evidentiary value. Respondent also proffered a number of freight bills from the trucker, many of which were illegible. Those that were legible showed that the goods were shipped to City Wide Distributors of Arkansas in Lowell, Arkansas rather than to respondent. There is no other evidence to sustain respondent's claim. The case must be dismissed.

ORDER

The complaint is dismissed.

THE HUBBARD COMPANY v. GEORGE DEPAOLI DISTRIBUTING COMPANY. PACA Docket No. 2-6580. Decided February 27, 1985.

Contract price—Burden of proof—Dismissed.

Andrew Y. Stanton, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,475.00 in connection with a shipment of lettuce intended for interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part the evidence in the case, as are the verified complaint and answer. The parties were also given an opportunity to submit additional evidence in the form of verified statements as well as to file briefs. Complainant filed an opening statement and respondent filed an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, The Hubbard Company, is a partnership whose address is P.O. Box 3917, Salinas, California.

2. Respondent, George DePaoli Distributing Company, is a corporation whose address is P.O. Box 776, Salinas, California. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On June 1, 1983, complainant entered into a contract with respondent whereby respondent purchased 825 cartons of lettuce at \$5.00 per carton plus \$.65 per carton cooling for a total of \$4,661.25.

a. It was agreed that respondent would pick up the lettuce on June 1, 1983, but complainant was unable to provide it at that time. Therefore, the parties agreed to postpone the lettuce pick-up until June 2, 1983.

4. On the morning of June 4, 1983, complainant's employee, Jay Iverson, called respondent's employee, Tom Cline. They discussed the fact that respondent's truck had not yet arrived, and Mr. Iverson proposed that the contract price be raised to \$8.00 per carton plus \$.65 per carton cooling for a total of \$7,136.25, f.o.b. Mr. Cline refused to accept this.

5. Respondent's truck eventually did arrive on June 4, 1983, and picked up the lettuce.

6. On June 4, 1983, complainant sent two telegrams to respondent, stating that the contract price had been raised from \$5.00 per carton to \$8.00 per carton.

7. On June 4, 1983, complainant also sent respondent an invoice containing the \$8.00 per carton price, which respondent returned, writing thereon that the \$8.00 per carton price was incorrect and should read \$5.00 per carton.

8. On June 6, 1983, respondent sent a telegram to complainant, denying that the price was \$8.00 per carton and insisting that the agreed upon price was \$5.00 per carton.

9. On June 6, 1983, respondent sent to complainant a price confirmation containing the \$5.00 per carton price, which complainant returned, writing thereon that the price was \$8.00 per carton.

10. On June 7, 1983, complainant wrote a letter to respondent, stating that respondent's confirmation was incorrect, and the price was not \$5.00 per carton but \$8.00 per carton.

11. An informal complaint was filed on June 27, 1983, which was within nine months from when the alleged cause of action accrued. A formal complaint was subsequently filed on April 11, 1984.

CONCLUSIONS

The dispute herein concerns the price terms of a contract whereby complainant sold to respondent a truckload of lettuce intended for shipment in interstate commerce. It is agreed that the original price terms were arrived at on June 1, 1983, and were \$5.00 per carton plus \$.65 per carton cooling, f.o.b. Complainant contends that the price was later changed to \$8.00 per carton plus \$.65 per carton cooling f.o.b., pursuant to negotiations between its employee, Jay Iverson, and respondent's employee, Tom Cline. Respondent denies that such a change was agreed to.

As the party alleging the change in the contract terms, it is complainant's burden to prove such allegation by a preponderance of the evidence. *American Banana Co., Inc. v. Marvin Gray*, 41 Agric. Dec. 539 (1982). Complainant has submitted as part of its opening statement an affidavit by Mr. Iverson, who states that he called respondent on the morning of June 4, 1983, because respondent's

truck had not arrived at complainant's cooler to pick up the lettuce. Mr. Iverson states that the contract originally provided for the lettuce to be picked up on June 1, 1983, but complainant was unable to provide the lettuce at that time and the parties agreed that the lettuce would be picked up the following day, June 2, 1983. However, claims Mr. Iverson, respondent's truck did not arrive on June 2 or June 3. He states that on June 3, 1983, he advised respondent's Mr. Cline that if the truck did not arrive that day, complainant would place the load elsewhere. When on the morning of June 4, 1983, he found that the truck had not yet arrived, he spoke with Mr. Cline and they renegotiated the price terms from \$5.00 to \$8.00 per carton plus \$.65 per carton cooling, f.o.b.

Mr. Cline has also submitted an affidavit, included in respondent's answering statement, in which he says that when he spoke to Mr. Iverson on June 4, 1983, he told Mr. Iverson that he could not change the contract, but would have to discuss the matter with his superior, Mr. George DePaoli. Mr. Cline states that when Mr. Iverson called back that same day and threatened to cancel the loading, he told Mr. Iverson that he expected the lettuce to be loaded as agreed.

There is obviously a direct conflict between the sworn statements of the two persons involved in the June 4, 1983, telephone conversations. In its brief, complainant argues that Mr. Iverson's statement is deserving of more evidentiary weight. We do not believe that either statement, standing alone, is more credible. We must examine the other evidence in the record to resolve the issue of the agreed upon contract price. Complainant has submitted two telegrams which it sent to respondent on June 4, 1983, confirming the \$8.00 per carton price (Finding of Fact 6), but the record also contains a reply telegram from respondent, dated June 6, 1983, disputing complainant and affirming the original \$5.00 per carton price (Finding of Fact 8). Complainant sent a June 4, 1983, invoice to respondent showing that \$8.00 per carton price, which respondent returned, writing thereon that the stated price was incorrect, and should read \$5.00 per carton (Finding of Fact 7). Respondent sent complainant a confirmation on June 6, 1983, reflecting the \$5.00 per carton price, which complainant returned, noting on such confirmation that the price stated was incorrect and should be \$8.00 per carton (Finding of Fact 9). Complainant also wrote a letter to respondent to this effect (Finding of Fact 10). It is clear from the record that although complainant has consistently maintained that the price was changed to \$8.00 per carton, respondent has just as consistently maintained that the price remained at \$5.00 per carton. On the basis of all the evidence submitted, we conclude

that complainant has failed to sustain its burden of proving a change in the contract terms. Therefore, the complaint must be dismissed.

ORDER

The complaint is hereby dismissed.

SEQUOIA ENTERPRISES, INC. v. CITY WIDE DISTRIBUTORS INC. PACA
Docket No. 2-6600. Decided February 28, 1985.

Jurisdiction—License—Burden of proof—Dismissed.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Leslie S. Hauger, Jr., Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$2,992.55 in connection with the sale of six loads of citrus fruit in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Respondent filed an answering statement. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Sequoia Enterprises, Inc., is a corporation with an address at 150 W. Pine Street, Exeter, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Blvd., Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At one point Mr. Barnes agreed with Mr. Laite that respondent would advance money to City Wide Distributors of Arkansas for the purchase of produce since the latter corporation lacked operating capital. Respondent admitted that immediately prior to the time of the transaction involved herein, and possibly when it occurred, that "upon receipt of produce allegedly purchased by the Arkansas Corporation, the undersigned requested the Respondent Corporation to pay such invoices, and to then invoice the Arkansas Corporation for the sums advanced. When the Arkansas Corporation failed to reimburse the Respondent Corporation, this practice was terminated." However, respondent did not make any statement in the record as to when or how the practice of making such payments was terminated.

4. During the time of the transactions involved in this proceeding respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On April 7, 1983 complainant sold in interstate commerce 210 cartons of citrus fruit at various prices for a total price of \$967.25. It issued two invoices which showed that respondent was the purchaser, and two bills of lading signed by the truckdriver which showed that the goods were to be delivered to respondent.

6. On April 18, 1983, complainant sold in interstate commerce 200 cartons of citrus fruit at various prices for a total price of \$863.75. It issued an invoice which showed that respondent was the purchaser, and a bill of lading signed by the truckdriver which showed that the goods were to be delivered to respondent.

7. On May 3, 1983, complainant sold in interstate commerce 50 cartons of citrus fruit for a total price of \$142.50. It issued an invoice which showed that respondent was the purchaser, and a bill of lading signed by the truckdriver which showed that the goods were to be delivered to respondent.

8. On May 6, 1983, complainant sold in interstate commerce 50 cartons of citrus fruit for a total price of \$192.50. It issued an invoice which showed that respondent was the purchaser, and a bill of lading signed by the truckdriver which showed that the goods were to be delivered to respondent.

9. On May 26, 1983, complainant sold in interstate commerce 91 cartons of citrus fruit at various prices for a total price of \$428.10. It issued two invoices which showed that respondent was the pur-

chaser, and two bills of lading signed by the truckdriver which showed that the goods were to be delivered to respondent.

10. On June 6, 1983 complainant sold in interstate commerce 77 cartons of citrus fruit at various prices for a total price of \$348.45. It issued two invoices which showed that respondent was the purchaser, and two bills of lading signed by the truckdriver which showed that the goods were to be delivered to respondent.

11. A formal complaint was filed on May 10, 1984. An informal complaint was filed on September 13, 1983, which was within nine months of the time the causes of action herein accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant contends that dealing through Corry Brokerage in six transactions it sold to respondent citrus fruit which was received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$2,992.55. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, there-

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baille Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *King Packing v. City Wide Distributors, Inc.*, PACA Docket No. 2-6501; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-6513; and *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578.

fore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period of the transactions respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of goods purchased in the 18 proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased produce totaling at least 2,000 pounds during the period April through June, 1983. In addition, the quantity of goods purchased in those 18 proceedings is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that respondent was, during the time of this transaction, conducting a business requiring a license under the Perishable Agricultural Commodities Act. It based its conclusion on records in respondent's file which showed that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the fruit. As the party claiming that respondent purchased and received the produce, complainant has the burden of proof to show

² Thus, if respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchase at least \$230,000.00 worth of produce in a year have been met.

that such was the case. *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973). Based on this record we find that complainant has failed to sustain its burden of proof. Although complainant claims to have sold the produce through Corry Brokerage, it has failed to provide the usual broker's memorandum for each sale, which documents would show the terms of sale, and to whom the goods were sold.³ In a case such as this where respondent hotly contests the claim that it purchased and received the goods, it is important that there be provided stronger evidence than invoices and bills of lading to show that respondent was the purchaser. Documents prepared by the broker, an ostensibly neutral third party, provide the nexus between the seller and the respondent. They have not been provided in this case. Other than the aforementioned confirmations of sale all that was provided is a letter from Arthur M. Zurhorst of Corry Brokerage to the Department of Agriculture which was received August 17, 1983.⁴ Without verification of broker's memoranda we cannot accept the statements therein that Mr. Barnes would handle financial concerns in dealings in which Ralph Laite, Jr., was involved as having any probative value. Thus, complainant has neither proved that respondent purchased and received the produce, or that it acted in a manner which subjected it to liability. Therefore, the complaint must be dismissed.

ORDER

The complaint is dismissed.

³ Respondent did provide a "confirmation of sale" from Corry Brokerage for each transaction. However, all they showed was that complainant was the seller of goods to several buyers, including a business known as City Wide. Those documents, issued on the first day of the month following the date of the transactions, cannot be given any evidentiary value.

KING PACKING *v.* CITY WIDE DISTRIBUTORS, INC. PACA Docket No.
2-6501. Decided February 20, 1985.

Failure to pay—Jurisdiction—Failure to meet burden of proof—Dismissal.

Dennis Becker, Presiding Officer.

Complainant, *pro se*

Leslie S. Hauger, Jr., for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$253.50 in connection with the sale of a partial truckload of avocados in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Because the amount claimed as damages was less than \$15,000, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Respondent filed an answering statement. In addition, respondent filed a brief.

FINDINGS OF FACT

1. Complainant, King Packing, is a partnership composed of Jan T. King and Sandra M. King with an address at 300 East Fifth Street, Camarillo, California.

2. Respondent, City Wide Distributors, Inc., is a corporation with an address at 2502 Charles Page Blvd., Tulsa, Oklahoma. At the time of the transactions involved in this proceeding respondent was subject to license under the Act.

3. The president of respondent is Kenneth Barnes. He is a shareholder in an Arkansas Corporation known as City Wide Distributors of Arkansas, Inc., located in Lowell, Arkansas. Mr. Ralph Laite, Jr., is also a shareholder in that corporation. At one point Mr. Barnes agreed with Mr. Laite that respondent would advance money to City Wide Distributors of Arkansas for the purchase of produce since the latter corporation lacked operating capital. Respondent admitted that immediately prior to the time of the transaction involved herein, and possibly when it occurred, that "upon

receipt of produce allegedly purchased by the Arkansas Corporation, the undersigned requested the Respondent Corporation to pay such invoices, and to then invoice the Arkansas Corporation for the sums advanced. When the Arkansas Corporation failed to reimburse the Respondent Corporation, this practice was terminated." However, respondent did not make any statement in the record as to when or how the practice of making such payments was terminated.

4. During the time of the transaction involved in this proceeding respondent purchased and sold fresh fruits and vegetables in the course of interstate commerce in quantities sufficient to require it to obtain a license under the Act.

5. On April 8, 1983, complainant sold and shipped in interstate commerce 30 bags of avocados at \$8.45 per bag for a total contract price of \$253.50. It issued an invoice which showed that the goods were sold to respondent.

6. A formal complaint was filed in this proceeding on January 17, 1984, which was within nine months of the time the cause of action accrued.

DISCUSSION

This is one of 18 similar proceedings involving the respondent, City Wide Distributors, Inc.¹ In this proceeding complainant con-

¹ In each case the basic defense raised by City Wide is that it never received the goods which were shipped. Each individual case is being determined on its own merits based upon the evidence provided by the parties. The nature of these cases, however, is such that recognition is being given by this Tribunal in each Decision and Order to the existence of all the other cases. The other 17 cases are:

J-B Distributing Co. v. City Wide Distributors, Inc., PACA Docket No. 2-6386; *Yakima Fruit & Cold Storage Co. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6412; *Tognazzini Supply, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6419; *Donald F. Nicolaus d/b/a/ D-N Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6421; *Dennis Produce Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6422; *Apple Sales, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6423; *Jack T. Baillee Co., Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6424; *Tanita Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6440; *Bull & Price, Inc. a/t/a Allan Bull Produce v. City Wide Distributors, Inc.*, PACA Docket No. 2-6462; *Seaboard Produce Distributors, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6471; *Gold Coast Packing, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6474; *Teixeira Farms, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6479; *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6485; *Borelli Produce Distributors v. City Wide Distributors, Inc.*, PACA Docket No. 2-6488; *Don Whitfield d/b/a/ Whitfield Brokerage Company v. City Wide Distributors, Inc. and/or City Wide Distributors of Arkansas, Inc.*, PACA Docket No. 2-

Continued

tends that dealing through Corry Brokerage it sold to respondent avocados which were received and accepted by respondent, but for which respondent has failed to make payment in the total amount of \$253.50. Respondent, on the other hand, has raised several defenses. First, it claims that the Department of Agriculture has no jurisdiction in this proceeding because respondent is not subject to license under the Act. Second, it claims that Corry Brokerage did not act as an agent for respondent, and, therefore, could not bind it. Third, respondent says that there was no contract between complainant and respondent. Fourth, respondent claims that it never received any of the produce which is involved in this proceeding.

We must deal first with the jurisdictional issue before considering other issues in this case. Based on all the evidence available in this proceeding we find that during the period of the transactions respondent was subject to license under the Act. Pursuant to 7 U.S.C. § 499a(6) a dealer is "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce. . . ." Pursuant to 7 CFR § 46.2(x) wholesale or jobbing quantities are "aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received." The quantity of goods purchased in the 18 proceedings mentioned above is so substantial as to warrant the conclusion that respondent purchased produce totaling at least 2,000 pounds during the period April through June, 1983. In addition, the quantity of goods purchased in those 18 proceedings is so substantial as to warrant the conclusion that respondent purchased more than \$230,000.00 worth of produce during 1983.² Furthermore, the Department of Agriculture undertook an investigation to determine whether respondent was subject to the Act, and concluded, based upon its inspection of respondent's records, that respondent was, during the time of this transaction, conducting a business requiring a license under the Perishable Agricultural Commodities Act. It based its conclusion on records in respondent's file which showed that respondent was purchasing and selling fruits and vegetables in interstate commerce. Obviously, based on the findings of the investigation by the Department, respondent was involved in the purchase and sale of fruits and vegetables during the applicable period. We find based

6513; *Corry Brokerage v. City Wide Distributors, Inc.*, PACA Docket No. 2-6578; and *Sequoia Enterprises, Inc. v. City Wide Distributors, Inc.*, PACA Docket No. 2-6600.

² Thus, respondent is a retailer, the requirements of 7 U.S.C. § 499a(b) that it purchased at least \$230.00 worth of produce in a year have been met.

upon this evidence that respondent was operating subject to the Act, irrespective of whether it was acting as a retailer or wholesaler.

This proceeding involves an initial determination as to whether complainant actually did deal with respondent, and in the second instance whether respondent acted in a manner which subjected it to liability to complainant regardless of who ultimately received the avocados. Respondent has denied that it purchased the avocados from complainant. As the proponent of the claim respondent did purchase and receive the avocados complainant has the burden of proof. See *New York Trade Association, Inc. v. Sidney Sandler*, 32 Agric. Dec. 702 (1983). Complainant has failed to sustain its burden of proof. The only evidence that respondent purchased and received the avocados is the invoice of complainant. In a case such as this, where respondent denies having purchased or received the produce, more is needed.

Complainant states that Corry Brokerage of Memphis, Tennessee was the broker in the transaction. As an ostensibly neutral third party a broker's memorandum which reflected the terms and conditions of the transaction would be given great weight. See *Homestead Tomato Packing Co. v. Mims Produce, Inc.*, 43 Agric. Dec. ____ (1984); *Kern Ridge Growers v. T.J. Power & Co.*, 40 Agric. Dec. 425 (1981). However, although Corry Brokerage stated in a letter dated February 28, 1984 that its records showed "the merchandise shipped was received in good order", it also stated that it could not find "the confirmation sent to City Wide in Tulsa." Its claim that the avocados were the other half of a 60 lug pallet that went to Vogel's, Inc., in Little Rock, Arkansas, is hardly persuasive in view of respondent's asserted belief that the goods were probably shipped to City Wide Distributors of Arkansas, Inc., in Lowell, Arkansas.

In view of the above, the complaint must be dismissed.

ORDER

The complaint is dismissed.

GROWERS PACKING COMPANY v. EMERSON H. ELLIOT d/b/a EMERSON ELLIOT PRODUCE. PACA Docket No. 2-6706. Decided February 20, 1985.

Admission of indebtedness.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$22,773.80 in connection with four shipments of tomatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an Order without further procedure is appropriate, pursuant to Section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Growers Packing Company is a corporation whose mailing address is P.O. Box 3012, Florida City, Florida 33034. Respondent, Emerson H. Elliot, is an individual doing business as Emerson Elliot Produce whose mailing address is P.O. Box 745, Casselberry, Florida 32707. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as the findings of fact of this Order. On the basis of these facts, we conclude that the actions of respondent are in violation of Section 2 of the Act (7 U.S.C. 499b), and have resulted in damages to complainant of \$22,773.80. Accordingly, within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, \$22,773.80, with interest thereon at the rate of 13 percent per annum from June 1, 1984, until paid.

MISCELLANEOUS REPARATION ORDERS ISSUED BY DONALD A.
CAMPBELL JUDICIAL OFFICER

WENATCHEE WENOKA GROWERS ASSOCIATION, INC. v. ANTHONY J.
D'ACQUISTO d/b/a TROPIC BANANA Co. PACA Docket No. 2-
6236. Order issued January 4, 1985.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on July 9, 1984, awarding reparation to complainant in the amount of \$165.64. Subsequent thereto, complainant moved that this matter be reopened for the taking of further evidence, and further moved that the July 9, 1984 Decision and Order be reconsidered. Consequently, the July 9, 1984, Decision and Order was stayed on August 15, 1984. Respondent filed an opposition to complainant's motions.

Complainant seeks to adduce new evidence which, if accepted, might affect the credibility of the broker involved in the transaction. However, although such evidence was available to complainant prior to the closing of the taking of evidence in this case, it failed to submit it. As respondent points out in its opposition to complainant's petition, under such circumstances it would be improper to reopen the record. Complainant's petition must therefore be denied. See *Salt River Valley Produce v. Hecht Produce*, 20 Agric. Dec. 1257 (1961).

In any event, that the broker subsequently pleaded guilty to preparing a false income tax form does not in any way establish that he was not a disinterested third party as to the transaction at issue here. Thus, even had the complainant promptly submitted the evidence regarding the broker's guilty plea, we do not believe that we would have ruled in a different manner. Furthermore, even had we ruled otherwise, the poor condition of the cherries¹ would have warranted a finding that respondent was entitled to damages, and such damages would have probably reduced the agreed contract price to the amount actually paid complainant by respondent.

In view of the above, complainant has established no grounds for reconsideration of the July 9, 1984, Decision and Order. Accordingly, the August 15, 1984, Stay Order is vacated, and the July 9, 1984, Decision and Order is reinstated except that respondent shall have

¹ The Federal inspection certificate reflects that the cherries had about 48% damage, including 15% serious damage.

until 30 day from the date of issuance of this Order to pay complainant the reparation awarded therein.

BUD ANTLE INC. *v.* PETER CONDAKES COMPANY INC. PACA Docket No. 2-6627. Order issued January 15, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$24,947.00 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated December 12, 1984, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

TOMATOES, INC. *v.* STANLEY & JOE RUSSO. PACA Docket No. 2-6335. Order issued January 22, 1985.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on December 4, 1984, awarding reparation to complainant in the amount of \$11,088 plus interest. A copy of this order was served upon the parties. On December 18, 1984, respondent requested reconsideration on the ground that it was wrongly concluded that it purchased the loads of produce in question.

The case was decided after careful consideration of the evidence and the briefs furnished by the parties. The record has been reviewed in the light of the points raised by respondent in its petition and, in our opinion, the Order of December 4, 1984, is amply supported by the evidence and the law applicable thereto. Accordingly, respondent's petition for reconsideration is dismissed without prior service upon complainant. The Order of December 4, 1984, is reinstated, except that the reparation awarded shall be paid within 30 days from the date of this Order.

BLUE ANCHOR, INC. v. SO. CENTRAL BROKERAGE, INC. and RODOLFO RUBIO d/b/a Gateway Produce Co. PACA Docket No. 2-6380. Order issued January 22, 1985.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on August 14, 1984, awarding reparation to the complainant in the amount of \$351.00 plus interest. By letter received August 31, 1984, respondent So. Central Brokerage, Inc. has moved that this matter be reconsidered.

Respondent So. Central Brokerage, Inc. claims that the order wrongly concluded that it sold the produce in question to Rodolfo Rubio d/b/a Gateway Produce Co. without complainant's approval. The record has been reviewed and it is concluded that the Decision and Order of August 14, 1984, is amply supported by the evidence and the law applicable thereto. Accordingly, the petition for reconsideration of respondent So. Central Brokerage, Inc. is hereby dismissed. The August 14, 1984, Decision and Order is reinstated and the reparation awarded therein plus interest shall be paid within 30 days from the date of this order.

HOMESTEAD TOMATO PACKING Co., INC. v. TOMATOES, INC. PACA Docket No. 2-6521. Order issued January 22, 1985.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on December 17, 1984, awarding reparation to complainant in the amount of \$6,048, plus interest. A copy of this order was served upon the parties. On December 31, 1984, respondent requested reconsideration on the ground that it was not informed that its answer must be verified in order to have evidentiary affect. However, the respondent was informed in the Department's letter of November 2, 1984, that its answer should be verified. Moreover, respondent was sent a copy of the Department's letter of April 6, 1984, which was addressed to complainant. In that letter, it was noted that the answer was not a part of the evidence of the case because it was not verified. After that time, respondent was given the opportunity to file further evidence by way of verified answering statement, but chose not to do so.

The case was decided after careful consideration of the evidence and the briefs furnished by the parties. The record has been reviewed in the light of the points raised by respondent in its petition and, in our opinion, the Order of December 17, 1984, is amply supported by the evidence and the law applicable thereto. Accordingly, respondent's petition for reconsideration is dismissed without prior service upon complainant. The Order of December 17, 1984, is reinstated, except that the reparation awarded shall be paid within 30 days from the date of this Order.

STEVCO, INC. *v.* NORDEN FRUIT CO. PACA Docket No. 2-6272. Order issued January 30, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$2,260.80 in connection with a transaction involving the shipment of grapes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated December 14, 1984, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of December 14, 1984, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

D'ARRIGO BROS. CO. OF CALIFORNIA *v.* PLAINVILLE PRODUCE. PACA Docket No. 2-6297. Order issued January 30, 1985.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on April 27, 1984, awarding reparation to complainant in the amount of \$1,312.50. Respondent filed a timely Petition for Reconsideration and a Stay Order was issued on June 4, 1984, staying the April 27, 1984, Order until the issuance of a further Order in this proceeding.

In its petition, respondent makes three allegations of error, none of which have merit. Respondent claims that it should have been

permitted to file its answering statement. However, such statement was properly rejected due to its untimely submission. Respondent contests the conclusion of the Decision and Order that it did not deny having purchased the subject lettuce on an f.o.b. basis. There was no error in this conclusion, as complainant's allegation of an f.o.b. sale was never denied by respondent in its sworn answer, the only evidence filed by respondent. Finally, respondent contends that even if there were an f.o.b. sale, the complainant seller caused the lettuce to be shipped under abnormal transportation conditions. Apparently, respondent is now asserting that complainant loaded the incompatible produce onto the truck in which the lettuce was shipped, which the Decision and Order concluded caused the subsequent damage to the lettuce. However, in its answer, respondent insisted that the broker, not complainant, ordered the incompatible produce to be loaded. The record is devoid of evidence that complainant had any involvement in this decision.

As there is no merit to respondent's petition for reconsideration, it must be denied.

ORDER

The Petition for Reconsideration is denied, the Stay Order is vacated, and the Decision and Order is reinstated.

Respondent shall pay to complainant the amount awarded in the Decision and Order, including interest, within 30 days from the date of this Order.

NORDEN FRUIT CO., a/t/a CAL-FRUIT v. D.J. FORRY CO., INC. PACA
Docket No. 2-6337. Order issued January 30, 1985.

ORDER VACATING STAY AND REINSTATING PRIOR ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on February 13, 1984, dismissing the complaint. Complaint moved for reconsideration on March 5, 1984. This was denied on March 22, 1984, but the denial was stayed by Order dated April 20, 1984. Complainant, by letter dated December 14, 1984, has withdrawn its request for reconsideration because of an amicable settlement between the parties.

Accordingly, the April 20, 1984, Stay Order is vacated, and the March 22, 1984, Order is reinstated.

TOM BENGARD RANCH, INC. v. MUTUAL PRODUCE, INC. PACA Docket No. 2-6349. Order issued January 30, 1985.

ORDER GRANTING RECONSIDERATION AND AMENDING PRIOR ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on April 18, 1984, in which the complaint was dismissed and the respondent's counterclaim was granted in the amount of \$2,940.00 with interest thereon at the rate of 13 percent per annum from December 1, 1982, until paid.

The complainant thereafter requested reconsideration of this matter and the Decision and Order was stayed on May 9, 1984. The complainant's petition for reconsideration was served on the respondent which filed a response in opposition thereto.

The complainant seeks reconsideration of the April 18, 1984, Decision and Order in two respects. First, complainant suggests that the conclusion in the Decision and Order that the subject shipment of lettuce was in unsuitable shipping condition was incorrect. We have reviewed the record and find that complainant's contention is without merit. All the facts put into evidence by the parties were considered, and these facts support the conclusion in the reparation order of April 18, 1984, to which complainant objects.

Second, complainant alleges that we erred in granting respondent's counterclaim in the amount of \$2,940.00 because, although we correctly computed respondent's damages, we failed to deduct these damages from the amount due complainant. In this regard, complainant is correct. See *Freshpict Foods v. Charles P. Sweeney Co.*, 30 Agric. Dec. 403 (1971).

The measure of damages for breach of warranty as to accepted goods is the difference at the time and place of delivery between the value of the goods delivered and the value they would have had if they had been as warranted. U.C.C. § 2-714; *Ritepak Produce v. Green Grove Markets*, 29 Agric. Dec. 165 (1970). The value of the goods, if as warranted, is the market news price for lettuce on the date of delivery. That price is \$8.00 per carton, or \$7,200.00. The value of the goods delivered is the proceeds of the prompt and proper resale, or \$4,260.00. Respondent's damage is thus \$2,940.00. The contract price for the 900 cartons of lettuce was \$6,142.50. From this, we deduct respondent's damages of \$2,940.00. Respondent must also be credited with its payment to complainant of \$920.30. Respondent thus is still obligated to complainant in the amount of \$2,282.20. Respondent's failure to pay complainant this amount is a violation of Section 2 of the Act for which reparation

plus interest should be awarded. In view of this, respondent's counterclaim is without merit and should have been dismissed.

Accordingly, the Order of April 18, 1984, is amended to read as follows:

Within thirty (30) days of the date of this Order, respondent shall pay complainant \$2,282.20, as reparation, with interest thereon at the rate of 13% per annum from November 1, 1982, until paid.

The counterclaim is dismissed.

Copies of this Order shall be served on the parties.

The reparation awarded in the order of April 18, 1984, as thus amended, shall be paid within 30 days from the date of this Order.

GOLD COAST PACKING v. H. SCHNELL & COMPANY, INC. and/or
LLOYD MYERS Co., INC. PACA Docket No. 2-6414. Order issued
January 30, 1985.

STAY ORDER AND EXTENSION OF TIME FOR FILING PETITION TO
REHEAR, REARGUE, AND RECONSIDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an Order was issued on December 17, 1984. In a telephone conversation with the Presiding Officer, respondent Lloyd Myers Co., Inc., requested a stay for the purpose of submitting a petition to rehear, reargue, and reconsider. In support thereof, respondent noted that it did not receive service of the Order until January 14, 1985, because the Department failed to use the latest address which was on file.

Accordingly, the Order of December 17, 1984, is stayed as to respondent Lloyd Myers Co., Inc. It remains effective as to respondent H. Schnell & Company, Inc.

Respondent Lloyd Myers Co., Inc., is hereby granted ten (10) days from its receipt of this Order within which to file a petition to rehear, reargue, and reconsider. The petition specifically shall state the matters claimed to have been erroneously decided, and the alleged errors. The petition has no evidentiary value and therefore does not need to be verified.

SUNVALLEY PACKING COMPANY v. C.H. ROBINSON COMPANY. PACA
Docket No. 2-6672. Order issued February 1, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$3,920.00 in connection with a transaction involving the shipment of lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated January 10, 1985, complainant notified the Department that it no longer wished to pursue this matter through formal proceedings. Complainant, in its letter of January 10, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

RENE PRODUCE DISTRIBUTORS INC. v. BG ENTERPRISES INC., a/t/a BG
SALES. PACA Docket No. 2-6558. Order issued February 21,
1985.

ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of \$28,832.30 against respondent in connection with transactions in interstate commerce involving shipments of mixed vegetables. A copy of the formal complaint was served upon respondent, and respondent has filed an answer thereto. An oral hearing was held on December 6, 1984.

Complainant, Rene Produce Distributors Inc., is a corporation whose address is P.O. Box 1178, Nogales, Arizona. Respondent, BG Enterprises Inc. a/t/a BG Sales, is a corporation whose address is P.O. Box 1806, Nogales, Arizona. Respondent was licensed under the Act at the time of the transactions involved herein.

Prior to the issuance of a Decision and Order in this proceeding, the Department was advised that respondent had filed in the United States Bankruptcy Court, District of Arizona (Tucson Division), a voluntary petition for reorganization pursuant to Chapter XI of the Bankruptcy Act (11 U.S.C. §§1101-1174).

11 U.S.C. § 362 provides for an automatic stay against continuing an action involving a debt once a party has filed a petition under

the Bankruptcy Code. Therefore, in accordance with 11 U.S.C. § 362, this reparation proceeding is hereby continued until the Department receives proper notification that the Chapter 11 proceeding now pending in the United States Bankruptcy Court has been closed, dismissed, or that the debts have been discharged.

MARK L. HANESS d/b/a C.J.'S BROKERAGE v. REX E. SPARKS,
PRODUCE, INC. PACA Docket No. 2-6594. Order issued February 22, 1985.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on January 18, 1985. A Petition for Reconsideration was filed on February 4, 1985. In that petition respondent raised two reasons why it believed the Decision should be changed. First, it claimed that the evidence of record does not support the conclusions reached. Second, it claimed that case law cited in the Decision has been superseded by recent changes in the Uniform Commercial Code. We cannot agree with respondent.

The overriding consideration in this case is that respondent had a duty to effectuate a prompt and proper resale of the potatoes if it were to claim damages because of their poor quality on arrival. To permit the potatoes to sit at its place of business for 10 days before handling them is not a prompt and proper resale. Respondent's claim that section 2-513 of the Uniform Commercial Code provides that partial unloading of the potatoes is not an act of acceptance when an inspection is necessary to ascertain condition is not accurate. In this highly regulated industry the case law surrounding the Perishable Agricultural Commodities Act prevails in reparation proceedings when there is a conflict. *C.J. Prettyman, Jr., Inc. v. J.K. Packing Company*, 28 Agric. Dec. 1476 (1969), makes it clear respondent accepted that potatoes when it partially unloaded the truck. Respondent, therefore, needed to know the exact condition of the potatoes when they arrived in order to protect itself. It could have done so by securing a federal inspection. It makes no difference that complainant told it that it need not do so. The inspection was not for complainant's benefit.

In view of the above, the Petition for Reconsideration is denied. The Decision and Order dated January 18, 1985, remains in effect,

except that it shall become effective on the date this Order is signed.

CHARLES W. GIBSON, DAN M. JOHNSTON and GERALD A. JOHNSTON
d/b/a JOHNSTON-GIBSON SALES COMPANY *v.* FELDMAN BROTHERS
PRODUCE, INC. PACA Docket No. 2-6249. Order issued February 27, 1985.

RULING ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on January 10, 1985, awarding reparation to the complainant in the amount of \$3,617.00 plus interest. By letter received January 18, 1985, respondent has moved that this matter be reconsidered.

Respondent claims that the Decision and Order should not have combined the results of the two inspections taken of the produce in dispute, as the first inspection should be considered controlling. Respondent contends that the first inspection clearly shows a breach of warranty.

After carefully considering respondent's argument, we are of the opinion that the Decision and Order was correctly decided, based on the facts of the case and the applicable law, as cited therein. Therefore, there is no merit to respondent's Petition for Reconsideration, and it is hereby dismissed. The amount awarded in the January 10, 1985, Decision and Order shall be paid within 30 days from the date of this Order.

REPARATION DEFAULT DECISIONS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

WALTERS PRODUCE INC. *v.* SOUTHWEST PRODUCE INC. PACA Docket No. RD-85-67. Decided January 2, 1985.

Respondent was ordered to pay complainant, as reparation, \$22,850.00 plus 13 percent interest per annum from February 1, 1984, until paid.

VALDES FARMS INC. *v.* TAVERA FRUIT IMPORT INC. PACA Docket No. RD-85-68. Decided January 2, 1985.

Respondent was ordered to pay complainant, as reparation, \$15,599.60 plus 13 percent interest per annum from January 1, 1984, until paid.

REX MUSHROOMS INC., *v.* LAKE CITY WHOLESALE FOODS & PRODUCE. PACA Docket RD-85-69. Decided January 2, 1985.

Respondent was ordered to pay complainant, as reparation, \$3,053.75 plus 13 percent interest per annum from July 1, 1984, until paid.

ROCKY PRODUCE INC., *v.* MID CITY WHOLESALE PRODUCE CO. PACA Docket RD-85-71. Decided January 2, 1985.

Respondent was ordered to pay complainant, as reparation, \$3,500.50 plus 13 percent interest per annum from September 1, 1983, until paid.

CLARENCE W. ROBINSON d/b/a ROBINSON FARMS *v.* MICHAEL BROS. INC. PACA Docket No. RD-85-84. Decided January 24, 1985.

Respondent was ordered to pay complainant, as reparation, \$3,539.33 plus 13 percent interest per annum from November 1, 1983, until paid.

GROWERS PACKING COMPANY v. JOSEPH A. CUTTONE Co. PACA Docket No. RD-85-83. Decided January 24, 1985.

Respondent was ordered to pay complainant, as reparation, \$11,330.00 plus 13 percent interest per annum from May 1, 1984, until paid.

CAPERS ISLAND FARM INC. v. CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE Co. PACA Docket No. RD-85-85. Decided January 24, 1985.

Respondent was ordered to pay complainant, as reparation, \$39,480.00 plus 13 percent interest per annum from July 1, 1984, until paid.

MARVIN SCHWARZ PRODUCE v. JERRY G. LOWE d/b/a LOWE FRUIT & PRODUCE. PACA Docket No. RD-85-86. Decided January 25, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,026.50 plus 13 percent interest per annum from April 1, 1984, until paid.

ROGER HARLOFF PACKING INC. v. CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE Co. PACA Docket No. RD-85-72. Decided January 25, 1985.

Respondent was ordered to pay complainant, as reparation, \$47,512.40 plus 13 percent interest per annum from July 1, 1984, until paid.

PEREZ RANCHES INC. a/t/a P.R.I. SALES Co. v. GRAYSON E. LEWIS d/b/a TOMATO OF VA. PACA Docket No. RD-85-73. Decided January 28, 1985.

Respondent was ordered to pay complainant, as reparation, \$48,187.90 plus 13 percent interest per annum from April 1, 1984, until paid.

BUSHMANS' INC. *v.* CHARLES M. YOUNG. PACA Docket No. RD-85-74. Decided January 25, 1985.

Respondent was ordered to pay complainant, as reparation, \$725.45 plus 13 percent interest per annum from March 1, 1984, until paid.

SIGMA PRODUCE CO. INC. *v.* MAX KAUFMAN INC. PACA Docket No. RD-85-75. Decided January 25, 1985.

Respondent was ordered to pay complainant, as reparation, \$191,552.82 plus 13 percent interest per annum from May 1, 1984, until paid.

UCON PRODUCE INC. *v.* B&E PRODUCE INC. PACA Docket No. RD-85-76. Decided January 25, 1985.

Respondent was ordered to pay complainant, as reparation, \$29,725.00 plus 13 percent interest per annum from July 1, 1984, until paid.

I.R. JEROME COMPANY LTD. *v.* MAX KAUFMAN INC. PACA Docket No. RD-85-77. Decided January 28, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,209.35 plus 13 percent interest per annum from July 1, 1984, until paid.

PETER YANCICH *v.* HEIDEMA FRUIT AND PRODUCE COMPANY. PACA Docket No. RD-85-78. Decided January 28, 1985.

Respondent was ordered to pay complainant, as reparation, \$1,411.38 plus 13 percent interest per annum from November 1, 1983, until paid.

JOE PHILLIPS & ASSOCIATES, INC. *v.* ASIAN TRADING COMPANY LTD. PACA Docket No. RD-85-79. Decided January 28, 1985.

Respondent was ordered to pay complainant, as reparation, \$10,334.50 plus 13 percent interest per annum from May 1, 1984, until paid.

SOUZA BROS. PACKING CO. v. LAKE CITY WHOLESALE FOODS & PRODUCE. PACA Docket No. RD-85-80. Decided January 28, 1985.

Respondent was ordered to pay complainant, as reparation, \$18,373.10 plus 13 percent interest per annum from July 1, 1984, until paid.

SAM WANG FOOD CORP. INC. v. MANASSAS PRODUCE COMPANY INC. PACA Docket RD-85-81. Decided January 28, 1985.

Respondent was ordered to pay complainant, as reparation, \$9,633.00 plus 13 percent interest per annum from July 1, 1984, until paid.

RUSCONI FARMS a/t/a CAL-SWISS FOODS v. PRIME-PAC INC. PACA Docket No. RD-85-87. Decided January 29, 1985.

Respondent was ordered to pay complainant, as reparation, \$3,500.50 plus 13 percent interest per annum from September 1, 1983, until paid.

GRIFFIN-HOLDER CO. v. RONNIE ADAMS d/b/a C&R PRODUCE CO. PACA Docket No. RD-85-88. Decided January 29, 1985.

Respondent was ordered to pay complainant, as reparation, \$4,050.00 plus 13 percent interest per annum from April 1, 1984, until paid.

RISING STAR BROKERAGE INC. v. DORFMAN PRODUCE CO. INC. PACA Docket No. RD-85-89. Decided January 29, 1985.

Respondent was ordered to pay complainant, as reparation, \$1,037.50 plus 13 percent interest per annum from February 1, 1984, until paid.

SIX L'S PACKING COMPANY INC. v. CLARKTON TOMATO HOUSE. PACA Docket No. RD-85-90. Decided January 29, 1985.

Respondent was ordered to pay complainant, as reparation, \$7,316.00 plus 13 percent interest per annum from June 1, 1984, until paid.

CONSOLIDATED MARKETING INC. v. DAVEY BROS. INC. PACA Docket No. RD-85-99. Decided February 4, 1985.

Respondent was ordered to pay complainant, as reparation, \$9,587.02 plus 13 percent interest per annum from February 1, 1984, until paid.

THE WOODS COMPANY INCORPORATED v. GWENDOLYN V. CARELLO and ELAINE M. PAVIA d/b/a LAKE CITY WHOLESALE FOODS & PRODUCE. PACA Docket No. RD-85-100. Decided February 4, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,954.30 plus 13 percent interest per annum from April 1, 1984, until paid.

J.R. NORTON COMPANY v. TAYLOR-BYERS INC. PACA Docket No. RD-85-101. Decided February 4, 1985.

Respondent was ordered to pay complainant, as reparation, \$9,640.00 plus 13 percent interest per annum from June 1, 1984, until paid.

BLUE CREST BLUEBERRY GROWERS ASSOCIATION COOP. INC. v. STANLEY & JOE RUSSO. PACA Docket No. RD-85-102. Decided February 4, 1985.

Respondent was ordered to pay complainant, as reparation, \$85,871.10 plus 13 percent interest per annum from September 1, 1984, until paid.

37-38 BRONX TERMINAL PRODUCE INC. a/t/a LAS VILLAS v. LAS VILLAS DE NEW JERSEY INC. d/b/a MILLER PRODUCE. PACA Docket RD-85-95. Decided February 6, 1985.

Respondent was ordered to pay complainant, as reparation, \$35,146.50 plus 13 percent interest per annum from May 1, 1984, until paid.

CAROLINA PACKERS v. CARL D. CUTTONE d/b/a JOSEPH A. CUTTONE Co. PACA Docket No. RD-85-96. Decided February 6, 1985.

Respondent was ordered to pay complainant, as reparation, \$16,909.00 plus 13 percent interest per annum from July 1, 1984, until paid.

J.R. NORTON COMPANY v. ARMANDO CARDENAS d/b/a THE ALL AMERICAN CITY PRODUCE Co. a/t/a ELIAS CARDENAS PRODUCE. PACA Docket No. RD-85-97. Decided February 6, 1985.

Respondent was ordered to pay complainant, as reparation \$1,385.00 plus 13 percent interest per annum from November 1, 1983, until paid.

EDINBURG FRUIT & VEGETABLE Co. INC. v. C&R PRODUCE Co. PACA Docket No. RD-85-98. Decided February 6, 1985.

Respondent was ordered to pay complainant, as reparation, \$6,750.00 plus 13 percent interest per annum from May 1, 1984, until paid.

SEQUOIA ENTERPRISES INC. v. JOE N. RUSSO and STANLEY RUSSO d/b/a STANLEY & JOE RUSSO. PACA Docket No. RD-85-92. Decided February 8, 1985.

Respondent was ordered to pay complainant, as reparation, \$23,289.50 plus 13 percent interest per annum from May 1, 1984, until paid.

PRODUCE DISTRIBUTORS INC. *v.* MICHAEL BROS. INC. PACA Docket No. RD-85-93. Decided February 8, 1985.

Respondent was ordered to pay complainant, as reparation, \$12,779.44 plus 13 percent interest per annum from November 1, 1983, until paid.

MONTEREY AGRICULTURAL PRODUCTS INC. *v.* LAKE CITY WHOLESALE FOODS & PRODUCE. PAA Docket No. RD-85-94. Decided February 8, 1985.

Respondent was ordered to pay complainant, as reparation, \$20,269.00 plus 13 percent interest per annum from December 1, 1983, until paid.

RIGBY PRODUCE *v.* CHINO'S PRODUCE INC. and/or STEPHEN J. WEIDENBAKER d/b/a STEVE'S BROKERAGE. PACA Docket RD-85-103. Decided February 11, 1985.

The complainant against respondent Steve's Brokerage was dismissed because there was not sufficient evidence to hold it liable.

Respondent Chino's Produce Inc. was ordered to pay complainant, as reparation, \$4,725.00 plus 13 percent interest per annum from June 1, 1984, until paid.

VALLEY ONIONS INC. *v.* FRANK MARCHESOTTO COMPANY INC. PACA Docket No. RD-85-104. Decided February 11, 1985.

Respondent was ordered to pay complainant, as reparation, \$8,201.30 plus 13 percent interest per annum from April 1, 1984, until paid.

TIP TOP GROWERS AND PACKERS *v.* FERNANDO'S INC. PACA Docket No. RD-85-105. Decided February 11, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,639.20 plus 13 percent interest per annum from January 1, 1984, until paid.

GROWERS PACKING COMPANY *v.* FERNANDO'S INC. PACA Docket No. RD-85-106. Decided February 11, 1985.

Respondent was ordered to pay complainant, as reparation, \$3,580.40 plus 13 percent interest per annum from March 1, 1984, until paid.

HENRY AVOCADO PACKING CORPORATION *v.* FERNANDO'S INC. PACA Docket No. RD-85-107. Decided February 11, 1985.

Respondent was ordered to pay complainant, as reparation, \$1,524.00 plus 13 percent interest per annum from January 1, 1984, until paid.

A timely complaint was filed only with respect to the transaction of December, 1983, involved herein. The Secretary is without jurisdiction to award reparation on the prior transaction because the complaint was not filed within the required nine-month period.

PURE GOLD INC. *v.* FERNANDO'S INC. PACA Docket No. RD-85-108. Decided February 13, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,597.00 plus 13 percent interest per annum from May 1, 1984, until paid.

SOUTHLAND PRODUCE COMPANY a/t/a WESTERN FRUIT SALES CO. *v.* FRANK MARCHESOTTO COMPANY INC. PACA Docket No. RD-85-109. Decided February 13, 1985.

Respondent was ordered to pay complainant, as reparation, \$5,969.50 plus 13 percent interest per annum from August 1, 1984, until paid.

GIUMARRA VINEYARDS CORPORATION *v.* FRANK MARCHESOTTO COMPANY INC. PACA Docket RD-85-110. Decided February 13, 1985.

Respondent was ordered to pay complainant, as reparation, \$8,976.00 plus 13 percent interest per annum from September 1, 1984, until paid.

MATARAZZO BROS. CO. *v.* BEACON FRUIT & PRODUCE CO. INC. PACA Docket No. RD-85-111. Decided February 13, 1985.

Respondent was ordered to pay complainant, as reparation, \$22,912.00 plus 13 percent interest per annum from June 1, 1984, until paid.

HALL & COLE PRODUCE INC. *v.* BEACON FRUIT & PRODUCE CO. INC. PACA Docket No. RD-85-112. Decided February 13, 1985.

Respondent was ordered to pay complainant, as reparation, \$6,285.00 plus 13 percent interest per annum from June 1, 1984, until paid.

SAN MIGUEL PRODUCE INC. *v.* JOSEPH D. MOCERI PRODUCE INC. PACA Docket No. RD-85-6. Decided February 14, 1985.

Respondent was ordered to pay complainant, as reparation, \$2,399.00 plus 13 percent interest per annum from April 1, 1984, until paid.

NED'S MOODY CREEK PRODUCE INC. *v.* PRIME-PAC INC. a/t/a J&S POTATO COMPANY. PACA Docket No. RD-85-113. Decided February 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$10,075.00 plus 13 percent interest per annum from February 1, 1984, until paid.

B.H. HARMON FRUIT COMPANY INC. *v.* DANNY HAWKINS and TOMMY HAWKINS d/b/a HAWKINS & HAWKINS PRODUCE CO. PACA Docket No. RD-85-114. Decided February 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$10,426.39 plus 13 percent interest per annum from January 1, 1984, until paid.

SIX L's PACKING COMPANY INC. *v.* MBI ROZIER. PACA Docket No. RD-85-115. Decided February 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$4,156.25 plus 13 percent interest per annum from June 1, 1984, until paid.

THOMPSON BROKERAGE COMPANY INC. *v.* BATESVILLE PRODUCE CO. PACA Docket No. RD-85-116. Decided February 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$14,670.38 plus 13 percent interest per annum from July 1, 1984, until paid.

J.S. McMANUS PRODUCE CO. INC. *v.* ANDY'S PRODUCE CO. PACA Docket No. RD-85-117. Decided February 15, 1985.

Respondent was ordered to pay complainant, as reparation, \$9,238.90 plus 13 percent interest per annum from May 1, 1984, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS ISSUED
BY DONALD A. CAMPBELL, JUDICIAL OFFICER

NEW WEST FOODS *v.* FEDERATED FOODS, INC. PACA Docket No. RD-85-47. Order issued January 3, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on December 11, 1984, awarding reparation to the complainant in the amount of \$1,215.86. Prior to the issuance of the Default Order, by letter dated November 26, 1984, respondent has moved that this matter be reopened.

Accordingly, the Order of December 11, 1984, is hereby stayed. Complainant has fifteen (15) days from receipt of this Order to file an answer to the Petition to Reopen.

INTERNATIONAL FRESH & FROZEN FOODS, INC. *v.* JIMINI TRADING COMPANY. PACA Docket No. RD-84-475. Order issued January 3, 1985.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, subsequent to the issuance of a Default Order, respondent filed a Motion to Reopen the proceeding after default and allow the filing of an answer pursuant to Section 47.25 of the Rules of Practice (7 CFR 47.25(e)). Complainant was given the opportunity to respond to respondent's Motion, but failed to do so.

The record has been carefully considered and it is concluded that the Motion to Reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the Motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 Agric. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Respondent shall have ten days from receipt of this Order to file an answer to the complaint. No extension of time shall be granted. The failure to file a timely answer will result in this Order being vacated and the October 15, 1984, Default Order being reinstated.

RICHARD C. CRANE *v.* HEIDEYA FRUIT AND PRODUCE COMPANY.
PACA Docket No. RD-85-50. Order issued January 10, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on December 12, 1984, awarding reparation to the complainant in the amount of \$19,232.12. By telegram received December 17, 1984, respondent has moved that this matter be reopened after default.

Accordingly, the order of December 12, 1984 is hereby stayed. Complainant may have fifteen (15) days from receipt of this Order to file an answer to the Petition to Reopen.

M.G. HURD & SONS INC. *v.* JOHN A. DEANDRESSI d/b/a TROPICANA BANANA Co. PACA Docket No. RD-85-61. Order issued January 10, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$3,945.75 in connection with a transaction involving the shipment of apples in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated December 7, 1984, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

HUNTS POINT TOMATO Co., INC. *v.* D. FAVA INC. PACA Docket No. RD-85-66. Order issued January 10, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$8,283.50 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated December 7, 1984, complainant authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

F&L ENTERPRISES, INC. v. T.J. POWER & COMPANY. PACA Docket
No. RD-85-64. Order issued January 17, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), respondent was notified by the Department in a letter dated November 30, 1984, that it was in default. A Default Order was issued on December 31, 1984, awarding reparation to the complainant in the amount of \$3,047.26. By letter received December 21, 1984, respondent in effect moved that this matter be reopened after default.

Accordingly, the Order of December 31, 1984 is hereby stayed. Complainant has fifteen (15) days from receipt of this Order to file an answer to the Petition to Reopen after Default.

TEX-CAL LAND, INC. v. JOE N. RUSSO and STANLEY RUSSO d/b/a
STANLEY & JOE RUSSO. PACA Docket No. RD-85-23. Order
issued February 1, 1985.

ORDER VACATING STAY ORDER REINSTATING DEFAULT ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on November 26, 1984, awarding reparation to the complainant in the amount of \$8,430.00 plus interest.

A Stay Order was issued on December 24, 1984, in response to respondent's Motion to Reopen after Default. Respondent was given 10 days from its receipt of the Stay Order to give a reason why it failed to file a timely answer. Respondent was told that its failure to file such a response within the specified period would result in the reinstatement of the Default Order. Respondent has not filed a timely response. Therefore, the December 24, 1984, Stay Order is hereby vacated and the November 26, 1984, Default Order

is reinstated. The reparation awarded in the Default Order shall be paid within 30 days from the date of this Order.

FLORIDA TOMATO PACKERS, INC. *v.* STANLEY and JOE RUSSO. PACA
Docket No. RD-85-15. Order issued February 4, 1985.

ORDER ON REQUEST TO REOPEN AFTER DEFAULT

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Default Order was issued on November 8, 1984, requiring that respondent pay complainant \$6,920.00 with interest thereon from May 1, 1984, until paid. On November 20, 1984, the respondent sent the Department a letter claiming not to be in default "on the loads [sic]" in issue. However, respondent failed to put forth any reason why it failed to file a timely answer to the complaint filed against it. This answer was due not later than October 15, 1984. The only support respondent proffered was a copy of a letter to complainant, dated November 5, 1984, offering to settle the matter. On December 12, 1984, while respondent's November 20, 1984, response was under consideration, respondent sent the Department a telegram stating that the matter had been amicably settled between the parties. In a phone conversation with a representative of the Secretary, complainant denied respondent's assertion as to settlement.

In view of respondent's failure to file a proper petition to reopen after default, respondent's failure to state any good reason why it failed to file a timely answer, and the misleading statements in its December 17, 1984, telegram, respondent's request for reopening after default is denied.

Respondent shall have 30 days from the date of this Order to pay complainant the reparation awarded it in the November 8, 1984, Default Order.

ASSOCIATED AMERICAN PRODUCE SALES *v.* JOE N. RUSSO and STANLEY RUSSO d/b/a STANLEY & JOE RUSSO. PACA Docket No. RD-85-25. Order issued February 7, 1985.

ORDER VACATING STAY, REINSTATING DEFAULT ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on November 26, 1984, awarding reparation to

the complainant in the amount of \$9,964.35 plus interest. In response to respondent's Motion to Reopen after Default, the Department issued a Stay Order on December 24, 1984. Respondent was directed to submit a reason why it failed to file a timely answer, within 10 days from its receipt of the Stay Order. The Stay Order stated that if such reason was not submitted within the 10 day period, the Default Order would be reinstated. Respondent has failed to submit its reason within the 10 day period. Therefore, the Stay Order is hereby vacated and the Default Order is reinstated. The reparation awarded in the Default Order shall be paid within 30 days from the date of this Order.

STONOCA FARMS CORPORATION *v.* PURITY SUPREME, INC. PACA
Docket No. RD-85-91. Order issued February 7, 1985.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$8,900.00 in connection with a transaction involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated January 9, 1985, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of January 9, 1985, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

PRODUCE DISTRIBUTORS INC. *v.* MICHAEL BROS. INC. PACA Docket
No. RD-85-93. Order issued February 12, 1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on February 8, 1985, awarding reparation to the complainant in the amount of \$12,779.44. By telegram received January 17, 1985, but not processed until after the Default Order was issued, respondent has moved that this matter be reopened after default.

Accordingly, the Order of February 8, 1985, is hereby stayed. Complainant may have fifteen (15) days from receipt of this Order to file an answer to the Petition to reopen after default.

CLARENCE W. ROBINSON d/b/a ROBINSON FARMS v. MICHAEL BROS.
INC. PACA Docket No. RD-85-84. Order issued February 14,
1985.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on January 24, 1985, awarding reparation to the complainant in the amount of \$3,539.33. By telegram received January 17, 1985, but not processed until after the Default Order was issued, respondent has moved that this matter be reopened after default.

Accordingly, the order of January 24, 1985 is hereby stayed. Complainant may have fifteen (15) days from receipt of this Order to file an answer to the Petition to Reopen after Default.

In re: ALBERTINE LAKE. PQ Docket No. 32. Order issued January 7, 1985.

Decision By John A. Campbell, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown, Complainant's motion to dismiss the complaint without prejudice, is granted.

In re: ROBERT SOKOSKY and GLOBAL VAN LINES, INC. PQ Docket No. 19. Order issued January 8, 1985.

Decision By Victor W. Palmer, Administrative Law Judge.

ORDER OF DISMISSAL

For good cause shown by complainant, the complaint that was filed herein against respondent Robert Sokolsky on August 30, 1984, is herewith dismissed.

In re: RICHARD KARTHOUSE and ALLIED VAN LINES. PQ Docket No. 28. Order issued January 8, 1985.

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

Complainant has filed a Motion to Dismiss the Complaint on the grounds that prosecution is no longer warranted to effectuate the purposes of the program.

IT SHOULD BE AND IS HEREBY ORDERED that the Complaint is dismissed without prejudice.

In re: VICTOR QUINOPPOS RAGONTON. PQ Docket No. 29. Order issued January 8, 1985.

Decision By Victor W. Palmer, Administrative Law Judge.

ORDER OF DISMISSAL

For good cause shown by complainant, the complaint that was filed herein against Victor Quinopos Ragonton on November 9, 1984, is herewith dismissed without prejudice.

In re: PHILLIP KILLINGSWORTH. PQ Docket No. 13. Order issued January 9, 1985.

Decision by Dorothea A. Baker, Administrative Law Judge.

ORDER OF DISMISSAL

For the reasons set forth in complainant's Motion to Dismiss, filed January 8, 1985, the complaint herein filed August 29, 1984, is hereby ordered to be Dismissed.

In re: EASTERN AIR LINES, INC. PQ Docket No. 2. Order issued January 22, 1985.

Civil penalty—Consent.

Kris Ihejiri, for complainant.

Carmen L. Leon, Miami, Florida, for respondent.

Decision By John A. Campbell, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act (PQA) (7 U.S.C. § 151 *et seq.*) and the Act of February 2, 1903, as amended, (Act) (21 U.S.C. § 111 and § 120) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Eastern Air Lines, Inc., violated the PQA and the Act and regulations promulgated thereunder (7 CFR § 319.8 *et seq.* and § 319.56 *et seq.* and 9 CFR § 71.1 and § 78.1 *et seq.*). Respondent Eastern Air Lines, Inc., and the complainant have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purpose of this stipulation and the provisions of this Consent Decision only, respondent Eastern Air Lines, Inc., admits

specifically that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegation in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) Any further procedure;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof;

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent Eastern Air Lines, Inc., also stipulates and agrees that United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. Eastern Air Lines, Inc., herein referred to as respondent, is a corporation doing business in the United States of America, whose mailing address is, Miami International Airport, Miami, Florida 33148.

2. On or about July 22, 1983, the respondent imported into Miami, Florida, from Jamaica, two boxes of yams, weighing approximately 40 pounds each.

3. On or about March 15, 1984, the respondent imported into Miami, Florida, from Chile, frozen lamb, weighing approximately 34 pounds.

4. On or about May 2, 1984, the respondent imported into Miami, Florida, various fruits and vegetables.

5. On or about May 13, 1984, the respondent imported into Miami, Florida, from the Dominican Republic, fresh green beans, weighing approximately 1,427 pounds.

CONCLUSIONS

Respondent Eastern Air Lines, Inc., having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

Respondent Eastern Air Lines, Inc., is assessed a civil penalty of four thousand five hundred dollars (\$4,500.00) which shall be pay-

able to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kris H. Ikejiri, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, DC 20250, within thirty (30) days from the effective date of this Order.

In re: UNITED VAN LINES, INC. PQ Docket No. 18. Order issued January 25, 1985.

Decision By Edward H. McGrail, Administrative Law Judge.

ORDER OF DISMISSAL

For good cause shown by complainant, the complaint that was filed herein against respondent United Van Lines, Inc. on August 30, 1984 is hereby dismissed.

In re: RAUL D. JIMENEZ and LUIS S. FEYT. PQ Docket No. 7. Order issued December 14, 1984.

Unloading garbage in violation of regulations—Civil penalty.

Respondents unloaded garbage from overseas flight in violation of regulations. Respondent's explanation that they were unaware of regulations was held unpersuasive. Respondents were each assessed a civil penalty of \$150.00

Jaru Ruley, for complainant.

Respondent, pro se.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of civil penalties for violations of the regulations governing unloading of garbage from any means of conveyance arriving in the United States or any of its territories or possessions (9 CFR § 94.5(b)(1) and 7 CFR § 330.400(b)(1)), hereinafter referred to as the regulations, in accordance with the Rules of Practice applicable to this proceeding (9 CFR §§ 93.1 *et seq.* and 7 CFR §§ 1.130 *et seq.* and 380.1 *et seq.*).

This proceeding was initiated by a complaint filed on April 12, 1984, by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about December 22, 1983, respondents unloaded garbage from Transportes Aereos Nacionales flight

number 801, which had entered the United States from Honduras, in violation of Sections 94.5(b)(1) and 330.400(b)(1) of the regulations because the garbage was not unloaded, under the direction and supervision of an Animal and Plant Health Inspection Service inspector, to an approved facility for incineration, sterilization, or grinding into an approved sewage system, as required. On May 15, 1984, respondents filed letters which purported to explain their violation by stating that they were unaware of the regulations governing the unloading of garbage from certain air flights. In their letters, respondents also failed to deny any of the allegations in the complaint. In accordance with Section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)), such failure to deny is deemed, for purposes of this proceeding, an admission of said allegations. Respondents also failed to request a hearing within the time allowed for the filing of their answers, thereby constituting a waiver of such hearing. (see 7 CFR § 1.141).

There being no basis for a hearing, and after due consideration of respondents' explanations, the material facts alleged in the complaint, which, in accordance with Section 1.136(c) of the Rules of Practice (7 CFR § 1.136(c)), are deemed admitted, are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 CFR § 1.139).

FINDINGS OF FACT

1. Respondent Raul D. Jimenez is an individual whose address is 459 N.W. 25th Ave., Miami, Florida 33125.

2. Respondent Luis S. Feyt is an individual whose address is 911 N.W. 23rd Ave., Miami, Florida 33125.

3. On or about December 22, 1983, at the Miami International Airport, Miami, Florida, respondents unloaded garbage from Transportes Aereos Nacionales flight number 801, which had entered the United States from Honduras, in violation of sections 94.5(b)(1) and 330.400(b)(1) of the regulations because the garbage was not unloaded, under the direction and supervision of an Animal and Plant Health Inspection Service inspector, to an approved facility for incineration, sterilization, or grinding into an approved sewage system, as required.

CONCLUSIONS

By reason of the Findings of Fact set forth above, the respondents have violated the Act and regulations promulgated thereunder. In their answer, respondents did not deny any of the allegations in the complaint. Respondents' explanations as to the allega-

tions are unpersuasive. Both respondents have been employees of Transportes Aereos Nacionales Airlines since at least August of 1976 and should have been aware of the regulations. Furthermore, knowledge of the regulation is not required for purposes of civil penalties under the applicable law. The asserted defense has been considered and is unpersuasive as to the issue of mitigation of the requested sanction.

Therefore, the following Order is issued.

ORDER

Respondents Raul D. Jimenez and Luis S. Feyt are hereby assessed civil penalties of one hundred fifty dollars each (\$150.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to Jaru Ruley, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, DC 20250, within thirty (30) days from the effective date of this Order. This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondents, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice applicable to this proceeding (7 CFR § 1.145).

[This Decision and Order became final January 26, 1985.—Ed.]

In re: MARK HOWELL and NORTH AMERICAN VAN LINES, INC. PQ
Docket No. 16, Order issued February 8, 1985.

Decision by William J. Weber, Administrative Law Judge.

ORDER DISMISSING COMPLAINT AS TO MARK HOWELL

Complainant has filed a motion to dismiss the Complaint as to Mark Howell on the ground that formal adjudication will not be necessary in order to effectuate the purposes of the program.

IT SHOULD BE AND HEREBY IS ORDERED that the Complaint as to Mark Howell is dismissed without prejudice.

In re: NORTH AMERICAN VAN LINES, INC. PQ Docket No. 16. Decided February 8, 1985.

Transporting outdoor article from gypsy moth high risk area to nonregulated area—Civil penalty—Consent.

Kevin Thiemann, for complainant.

Mark J. Andrews, Washington, D C for respondent.

Decision by William J. Weber, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, and the Federal Plant Pest Act (7 U.S.C. §§ 151-164a and 167, and 150aa *et seq.*) (Acts) by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service alleging that North American Van Lines, Inc., respondent, violated the Acts and regulations promulgated thereunder (7 CFR § 301.45 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in this complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision; and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

FINDINGS OF FACT

1. North American Van Lines, Inc., respondent, is a corporation doing business at Fort Wayne, Indiana and whose address is P.O. Box 988, Fort Wayne, Indiana 46801.

2. On or about January 9, 1984, the respondent moved interstate an outdoor household article from Plymouth, Massachusetts, a gypsy moth high risk area, to Mission Viejo, California, a gypsy moth nonregulated area.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of three hundred fifty dollars (\$350.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Kevin B. Thiemann, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, 12th and Independence Ave. S.W., Washington, D.C. 20250, within thirty (30) days from the effective date of this Order.

In re: ANA LOURDES. PQ Docket No. 35. Order issued February 21, 1985.

Decision by Victor W. Palmer, Administrative Law Judge.

ORDER OF DISMISSAL

For good cause shown by complainant, the complaint that was filed herein against Ana Lourdes on December 12, 1984, is herewith dismissed without prejudice.

In re: TRIANGLE AVIATION SERVICES. PQ Docket No. 12 and 33. Decided February 20, 1985.

Imported garbage removed without proper receptacles—Civil penalty—Consent.

Joseph Pembroke, for complainant.

Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

CONSENT DECISION

This proceeding was instituted under the Act of February 2, 1903, as amended (Act), (21 U.S.C. §§ 111 and 120) and the Act of August 20, 1912 as amended (Act) (7 U.S.C. §§ 151-164a and § 167) by a complaint* filed by the Administrator of the Animal and Plant Health Inspection Service alleging that Triangle Aviation Services, respondent, violated the Acts and regulations promulgated thereunder (7 U.S.C. § 330.400 and 9 U.S.C. § 94.5). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision only, respondent specifically admits that the Secretary of the United States Department of Agriculture has jurisdiction in this matter, neither admits nor denies the remaining allegations in the complaint, admits to the Findings of Fact set forth below, and waives:

(a) any further procedure;

(b) any requirements that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis thereof;

(c) all rights to seek judicial review and otherwise challenge or contest the validity of this decision, and

2. Respondent also stipulates and agrees that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. § 504 *et seq.*) for fees and other expenses incurred by the respondent in connection with this proceeding.

* [Added by Administrative Law Judge] There were two Complaints filed: July 24 1984, and, November 20, 1984.

FINDINGS OF FACT

1. Triangle Aviation Services, respondent, is a corporation whose mailing address is Building 110, John F. Kennedy International Airport, Jamaica, New York 11430.

2. On or about March 28, 1984, the respondent removed foreign origin garbage that arrived in New York aboard Trans Mediterranean Airways flight 368, that was not contained in tight, leak-proof receptacles.

3. On or about June 19, 1984, the respondent removed foreign origin garbage which arrived in New York aboard Trans Mediterranean Airways 368, that was not contained in tight, leak-proof receptacles.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and having agreed to the provision set forth in the following order in disposition of the proceeding, such Order and Decision will be issued.

ORDER

The respondent is assessed a civil penalty of nine hundred and fifty dollars (\$950.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to Joseph P. Pembroke, Office of the General Counsel, Room 2422, South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty days from the effective date of this Order.

JANUARY-FEBRUARY 1985

AGRICULTURAL MARKETING AGREEMENT ACT, 1937

PAGE

DISMISSAL

Petition for relief of audit adjustments.....	63
Temporary amendment supported.....	11

REQUIREMENTS OF MARKETING ORDER

Evidence supports temporary amendment.....	11
--	----

ANIMAL QUARANTINE AND RELATED LAWS

BRUCELLOSIS

Failure to test cattle.....	200
Interstate transportation of cattle.....	194, 206, 222
Interstate transportation of exposed calves.....	204
Interstate transportation of exposed cow.....	215
Interstate transportation of horse.....	213
Transportation of cattle without certificate.....	202

CIVIL PENALTY

Of \$100.00.....	237
Of \$300.00.....	212, 215, 217
Of \$450.00.....	195
Of \$500.00.....	194, 200, 204, 209, 222, 233
Of \$600.00.....	197, 212
Of \$700.00.....	238
Of \$800.00.....	232
Of \$1,000.00.....	202, 213, 220
Of \$1,050.00.....	199
Of \$1,500.00.....	207, 210
Of \$5,000.00.....	219
Of \$6,500.00.....	235

DISMISSAL

Prosecution no longer warranted.....	195
Without prejudice.....	204, 231

ANIMAL WELFARE ACT

CIVIL PENALTY

Of \$300.00.....	155
Of \$500.00.....	154, 173
Of \$1,000.00.....	157

ANIMAL WELFARE ACT—Cont.

CIVIL PENALTY—Cont. PAGE

Of \$1,200.00.....	171
Of \$2,500.00.....	158
Of \$7,000.00.....	187
Of \$10,000.00, partly suspended.....	152
Of \$124,000.00, partly suspended.....	170

DISMISSAL

Trivial violations involved.....	174
----------------------------------	-----

EXHIBITOR

License revoked for violations.....	158
-------------------------------------	-----

LICENSE

Cease and desist from buying, transporting, and selling animals without a license.....	171
Revoked.....	158
Suspended.....	153
Suspended for 35 days.....	187
Suspended permanently.....	170

SALE OR TRANSPORTATION

Educate employees of regulations and standards.....	157
---	-----

STANDARDS AND REGULATIONS

Cease and desist from violating.....	152, 153, 154, 155
Educate employees regarding.....	157
Ordered to comply with.....	171

EGG RESEARCH AND CONSUMER INFORMATION ACT

CIVIL PENALTY

Of \$28,000.00.....	240
---------------------	-----

SANCTIONS

For failure to submit reports, assessments.....	240
---	-----

FEDERAL MEAT INSPECTION ACT

INSPECTION SERVICE

Denial for indefinite time.....	243
Intimidation of inspector.....	245

SANCTION

Indefinite denial of inspection service.....	243
--	-----

FEDERAL MEAT INSPECTION ACT—Cont.

SANCTION—Cont. PAGE

Suspension of inspection service, held in abeyance..... 245

HORSE PROTECTION ACT

CIVIL PENALTY

Of \$2,000.00..... 248

Of \$3,000.00..... 248

EXHIBITOR

Disqualification..... 248

PACKERS AND STOCKYARDS ACT, 1921

ACCOUNTS AND RECORDS

Keep and maintain, which fully disclose all transactions.....258, 260

ACCOUNTS OF SALE OR PURCHASE

Failure to show true and correct weights and/or prices..... 262, 283

BONDING REQUIREMENT

Violation of..... 258, 273, 274, 277, 279, 280, 286, 292, 295

CHECKS OR DRAFTS

Failing to honor drafts when presented for payment..... 293, 296

Failure to remit funds to seller and to pay full price.....289

Issuing drafts without written agreements from sellers..... 293, 296

Issuing insufficient funds checks..... 260, 282, 287, 293

CIVIL PENALTY

Of \$400.00..... 292

Of \$500.00..... 279, 280

Of \$650.00..... 286

Of \$700.00..... 295

Of \$1,000.00..... 258, 262

Of \$1,750.00..... 277

Of \$2,500.00..... 287

Of \$10,000.00..... 289

Of \$45,000.00..... 270

DEALER

Bond, failure to file and maintain..... 258, 273, 279

Deception regarding price and weight.....262

Failing to honor drafts when presented for payment.....296

PACKERS AND STOCKYARDS ACT, 1921—Cont.

DEALER—Cont.	PAGE
Failure to pay and/or failure to pay when due.....	289, 296
Issuing false invoices.....	262
Suspended as a registrant.....	262, 283
Using false and incorrect weights.....	262
DEALER AND MARKET AGENCY	
Bond, failure to file and maintain.....	279, 292, 295
Failure to maintain a reasonable bond.....	258, 274, 280
Failure to pay when due.....	282, 293
Issuing insufficient funds checks.....	282, 293
Prohibited from business for specified period.....	258
Suspended as a registrant.....	270, 279, 280, 282, 293
MARKET AGENCY	
Bonding requirement violation.....	277
Failure to maintain reasonable bond.....	273
Prohibited from business for specified period.....	260, 286
MISREPRESENTATION	
Original purchase prices for livestock.....	262
Original purchase weights.....	270, 283
Purchases on a commission basis.....	262
PACKER	
Failure to hold funds in trust.....	290
Failure to pay when due.....	289, 290
Failure to pay when due and/or failure to pay when due.....	287
Insufficient funds checks.....	287, 290
PREVIOUS ORDERS	
Late appeal of Decision and Order denied.....	298
Provisions stayed pending judicial review.....	298
Suspension stayed pending judicial review.....	298
PURCHASE PRICE	
Deception regarding.....	262
SCALES AND WEIGHING	
False and incorrect weights.....	270, 283

PACKERS AND STOCKYARDS ACT, 1921—Cont.

	PAGE
SUPPLEMENTAL ORDER	
Suspension of registrant terminated.....	303
STAY ORDER	
Of suspension provisions.....	298
Pending judicial review.....	298
SUSPENSION OF REGISTRATION	
Indefinitely until compliance with bonding requirement.....	277, 279, 280
Suspended for:	
22 days.....	262
90 days.....	293
120 days.....	282
4 months.....	296
18 months.....	283
1 year.....	270, 274
Terminated following compliance.....	303
UNFAIR AND/OR DECEPTIVE PRACTICES	
Deception regarding price and weight.....	262, 270
False and incorrect weights.....	288
PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930	
ACCEPTANCE OF COMMODITY	
Absent notice of rejection.....	52
By unloading.....	364, 370, 373, 579
Failure to show change in contract terms.....	576
Part of commercial unit.....	532
ACCORD AND SATISFACTION	
Acceptance of check in full settlement.....	522
Failure to prove.....	541
ACCOUNTINGS	
Failure to account truly and correctly.....	333
Failure to keep account of sales.....	409
Lack of causes liability for entire purchase price.....	418
ADMISSION	
Of indebtedness.....	467, 606

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

AGENT	PAGE
As opposed to broker.....	464
Broker represented as.....	468
AGREEMENT	
Dissatisfaction not basis for voiding.....	405
Failure to prove agreement to purchase.....	545
APPEAL	
Due to denial of request for a continuance.....	316
Of licensing suspension.....	316, 333
BANKRUPTCY	
Automatic termination of license.....	314
Reparation action continued pending bankruptcy proceeding.....	316, 614
BROKER	
Acted as respondent's agent.....	314, 468
Duties of.....	376
BROKERAGE FEE	
No liability for, found to be seller's agent.....	464
CHECKS	
Failure to cash timely does not relieve indebtedness.....	442
COMPLAINT	
Dismissal of.....	367, 380, 414, 421, 464, 522, 524, 602, 536, 545, 572, 589, 594, 597
Filed more than nine months after cause of action accrued....	367
CONSIGNMENT	
Complainant entitled only to proceeds less expenses.....	442
Failure to prove.....	584
Records not supporting accounting.....	584
CONTRACT	
Breach of:	
Failure to prove.....	388, 576
Failure to prove damages resulting from.....	541
Failure to prove existence of.....	572
Failure to ship in suitable shipping condition.....	579
One percent variation in damage from tolerance does not constitute.....	532

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

CONTRACT—Cont.	PAGE
Burden of proof unmet.....	594
Change in terms.....	373, 388, 576
F.O.B. or consignment disputed.....	373, 388
Modification of.....	409
Oral.....	416
CONTRACT PRICE	
Failure to pay.....	450
CONTRACT TERM	
Breach of, failure to dry onions.....	427
Modification of original.....	452
COUNTERCLAIM	
Dismissal of.....	612
COURT DECISION	
U.S. Court of Appeals for the Eighth Circuit, Appeal from order, upholds sanction, responsibly connected person.....	304
DAMAGES	
Based on lowest known market price.....	576
Failure to prove.....	541
Failure to ship in suitable shipping condition.....	579
Measured by contract price less resale proceeds.....	400
DISMISSAL	
Breach of warranty.....	524
Complainant authorized dismissal of complaint.....	608, 614, 627, 628, 63
Complainant did not prove it was correct billing party.....	376
Complainant endorsed respondent's check in full settlement.....	521
Complainant failed to prove change in contract terms.....	51
Complainant failed to prove purchase/receipt or liability.....	56
Contract terms did not include pick-up date.....	42
Due to repudiation by seller.....	38
Failure to meet burden of proof.....	602, 53
Failure to present evidence of value.....	58
Failure to prove agreement to purchase.....	54
Failure to prove consignment sale.....	58
No breach of warranty found.....	414

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

DISMISSAL—Cont.

PAGE

No liability by seller's agent for brokerage fee.....464

Respondent tendered check to complainant in full settlement..... 610

DUMPING

Certificate not secured.....446

FAILURE TO PAY PROMPTLY

Publication of the facts.....314, 316, 333, 354, 356, 357, 359, 361

Revocation of license.....330, 331, 352

Suspension of license..... 333

F.O.B. SALE

Inspection not accepted as accurate.....370

INSPECTION

Lack of good delivery notification delayed..... 419

Partial only.....370

VOICES

accurate, virtually without evidentiary value.....589

Proof of contract terms..... 414

JURISDICTION

Cause of action accrual.....367

Subject to license under the Act...456, 476, 481, 489, 496, 503, 509, 515, 602, 586,
547, 554, 559, 566, 597

LIABILITIES

Assessing liability for payment...456, 476, 481, 489, 496, 503, 509, 515, 547, 554, 559,
566, 597

Revocation of..... 316, 330, 331, 352

Suspension of.....333

Terminated due to bankruptcy plan.....314

MERCHANTABILITY

Failure to prove not in merchantable condition.....452

MISREPRESENTATION

Failure to prove..... 442

PURCHASE PRICE

Failure to pay..... 314, 316, 330, 331, 333, 352, 354, 356, 357, 359

Increase due to changed pick-up date..... 421

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

RECONSIDERATION/REOPEN	PAGE
Correction of prior order.....	612
Motion to reopen after default, denied.....	630
Order reopening after default.....	627
Petition for reconsideration, denied.....	610, 615
Petition for reconsideration, dismissed.....	608, 609, 615
REJECTION	
Wrongful.....	400
Wrongful, but accepted by seller.....	380
REPARATION AWARDED	
Admission of indebtedness.....	606
Admission of liability.....	467, 488
Balances due and owing on transactions.....	541
Breach of "price after sale" agreement.....	388
Contract terms disputed.....	373
Dissatisfaction not basis for voiding agreement.....	405
Failed to fulfill contract condition.....	427
Failure to keep account of sales.....	409
Failure to pay.....	450, 456, 481, 489, 496, 503, 509, 515, 554, 559, 566, 586
Failure to prove breach of warranty.....	38
Failure to prove material misrepresentation.....	4
Inspection not accepted as accurate.....	2
Lack of good delivery notification delayed.....	4
Merchantability cannot be proved due to inspection delay.....	45
Oral contract upheld.....	416
Respondent bound by broker's actions.....	468
Respondent found to be purchaser.....	423
Wrongful rejection.....	4'
RESALE	
Breach of "price after sale" agreement.....	
Prompt and proper.....	51
STAY ORDER	
Pending filing of an answer to the petition to reopen after de- fault.....	613, 627, 629, 631, 61
Pending filing of petition to rehear, reargue, and reconsider.....	6

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Cont.

STAY ORDER—Cont.

PAGE

Vacated—prior order reinstated 607, 610, 611, 629, 630

SUITABLE SHIPPING CONDITION

Averaged condition defects..... 409

Breach of warranty..... 528, 541, 586

Bruising/discoloration allowed by contract..... 414

Inspecting less than half the units insufficient..... 370

One percent variation in damage from tolerance..... 582

UNDISPUTED AMOUNT

Order requiring payment of..... 404, 540

WARRANTY

Breach of..... 524, 528, 579, 586

Breach of, failure to prove..... 364, 414

PLANT QUARANTINE ACT

CIVIL PENALTY

Of \$150.00..... 636

Of \$350.00..... 639

Of \$950.00..... 641

Of \$4,500.00..... 634

DISMISSAL

Granted..... 633, 634, 636, 638, 640

GARBAGE

Unloaded in violation of regulations..... 636

PROHIBITED/RESTRICTED ARTICLE

Transported from gypsy moth high risk area..... 639

